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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 15-CR-00637 (KAM)
:
Plaintiff, :
: United States Courthouse
-against- : Brooklyn, New York
:
EVAN GREEBEL, :
: Friday, December 8, 2017
Defendant. : 9:00 a.m.
-----X

TRANSCRIPT OF CRIMINAL CAUSE FOR JURY TRIAL
BEFORE THE HONORABLE KIYO A. MATSUMOTO
UNITED STATES DISTRICT JUDGE
BEFORE A JURY

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Proceedings recorded by Stenographic machine shorthand,
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Proceedings

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1 (In open court; outside the presence of the jury.)

2 COURTROOM DEPUTY: All Rise.

3 THE COURT: Is there anything we need to address
4 preliminarily?

5 (No audible response.)

6 THE COURT: No? Good.

7 (Jury enters the courtroom at 9:21 a.m.)

8 THE COURT: We have all the jurors present. Please
9 have a seat.

10 Is the defense ready to call its next witness?

11 MR. DUBIN: Yes, your Honor. Defense calls Michael
12 Rosensaft.

13 THE COURT: Thank you.

14 (Witness takes the witness stand.)

15 MICHAEL ROSENSAFT,

16 called as a witness having been

17 first duly sworn/affirmed, was examined and
18 testified as follows:

19 COURTROOM DEPUTY: State and spell your full name
20 for the record.

21 THE WITNESS: My name is Michael Rosensaft, last
22 name R-O-S-E-N-S-A-F-T.

23 MR. DUBIN: May approach and hand the Court a
24 binder?

25 THE COURT: Yes, thank you.

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1 MR. DUBIN: May I proceed, Your Honor?

2 THE COURT: Yes.

3 DIRECT EXAMINATION

4 MR. DUBIN:

5 Q Good morning, Mr. Rosensaft. How are you?

6 A Good morning, good.

7 Q Where do you work, sir?

8 A I'm a partner at Katten Muchin Rosen.

9 Q What is your title?

10 A Partner.

11 Q Prior to being a partner at Katten Muchin, where did you
12 work?

13 A I worked at the United States Attorney's Office in the
14 Southern District of New York in Manhattan.

15 Q What position did you hold there?

16 A I was an Assistant United States attorney.

17 Q Can you describe for the ladies and gentlemen of the jury
18 your practice, in general?

19 A Sure. I'm in the white-collar group at Katten. So I
20 defend individuals, companies, who are under investigation. I
21 also do internal investigations for companies when there is
22 alleged wrongdoing. Then I represent companies and
23 individuals in responding to subpoenas or giving testimony,
24 whether it be in United States District Court or in front of
25 the SEC.

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1 Q Do you know Evan Greebel?

2 A I do.

3 Q And when did you first meet Mr. Greebel?

4 A I first met him I believe it was late 2012.

5 Q And how long did you work together with Mr. Greebel --
6 and you met him at Katten?

7 A Yes.

8 Q How long did you work together.

9 A I worked with him from late 2012 or beginning of 2013,
10 through I believe it was the fall of 2014.

11 Q Now based on your interactions with Mr. Greebel, based on
12 your observations, can you please describe in general for the
13 ladies and gentlemen of the jury, Mr. Greebel's work, your
14 impression of it?

15 A So Mr. Greebel and I, we were in different departments.
16 I was a litigator, I worked in this court. Mr. Greebel was a
17 corporate attorney, he drafted documents, worked with
18 companies. But I worked with him on basically two matters.
19 He seemed very diligent, very attentive to his clients,
20 hard-working.

21 Q In what you observed, sir, did you ever observe
22 Mr. Greebel do anything that you perceived to be wrong?

23 A Wrong as in illegal? No.

24 Q Did you, sir, have an opportunity to work with
25 Mr. Greebel on matters involving MSMB?

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1 A Yes.

2 Q And Retrophin?

3 A Correct.

4 Q Now, are you married, sir?

5 A I am.

6 Q Do you have children?

7 A Yes, I do.

8 Q How many?

9 A I have twins, two children.

10 Q Does your family socialize with Mr. Greebel's family?

11 A No, they do not.

12 Q And are your families close in any way?

13 A No.

14 Q Where did you grow up?

15 A I grew up in Oklahoma City.

16 Q And where did you go to -- let me do it this way.

17 Explain to the ladies and gentlemen of the jury a little bit
18 about your educational background?

19 A Sure. So I went to college at Johns Hopkins in
20 Baltimore, which is where I met my wife. After that I went to
21 the University of Pennsylvania Law School. Then I started
22 working, I first clerked for a Judge, then became an associate
23 at a law firm.

24 Q Where was the Judge, you don't have to tell me the name,
25 where was that?

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1 A She was on the Third Circuit Court of Appeals. Her
2 chambers was in Wilmington, Delaware, but when we heard cases
3 it was in Philadelphia.

4 Q Going back to after you graduated from law school, where
5 did you go to work what did you do?

6 A After law school that's when I clerked for the Judge for
7 a year. Then following that I was an associate at the law
8 firm of Cleary Gottlieb. And I was there for approximately
9 two years before joining the United States Attorney's Office.

10 Q Cleary Gottlieb, would you consider that a large firm or
11 a smaller firm?

12 A A very large firm.

13 Q Which office was that?

14 A It was in New York.

15 Q Now, so it was after Cleary, just to get the timeline
16 straight, after Cleary you went to work as a prosecutor in the
17 United States Attorney's Office?

18 A That's correct. I started in the United States
19 Attorney's Office in 2006.

20 Q Did you work on any -- tell the ladies and gentlemen of
21 the jury the types of cases you worked on as a prosecutor?

22 A So I a started working on a variety of smaller cases,
23 although every case was significant. Wire frauds, bank
24 frauds, small gun cases, narcotics cases. Then my more senior
25 unit that I moved into was the terrorism and international

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1 narcotics unit where I worked on cases involving terrorism,
2 international narcotics, money laundering. During my work
3 there I traveled I believe to 14 different countries, working
4 with prosecutors around the world to stop terrorism.

5 Q It was after you left the U.S. Attorney's Office in
6 Manhattan that you went to work for Katten?

7 A That's correct.

8 Q Aside from your responsibilities representing clients as
9 a partner at Katten, do you have any other responsibilities at
10 the firm?

11 A Yes, I oversee the training of our litigation associates.

12 Q What is that, briefly, what does that entail?

13 A We have regular training throughout the year where we
14 teach them about evidence, courtroom discovery in litigation,
15 a lot of stuff that they learned in law school but in an
16 academic way. And we teach them how it works in the law firm.

17 Then we do a mock trial in Chicago where our main
18 office is every spring. And in that I serve as the judge for
19 trial the associates try a case. And we actually have jurors
20 or mock jurors that we bring in outside of the firm who judge
21 the case.

22 Q Do you wear a robe?

23 A I don't, but I'm very serious. The last time one the
24 jurors raised their hands afterwards and asked if I was a real
25 judge and if it was real. We try to do it in a very serious

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1 manner.

2 Q Now, prior to coming to testify today did you meet with
3 members of Mr. Greebel's defense team?

4 A Yes.

5 Q And how many times?

6 A I had in-person meetings with them twice; then I spoke on
7 the phone once.

8 Q Who did you meet with?

9 A I met with Mr. Brodsky primarily.

10 Q Did you also meet with the prosecutors in this case?

11 A Yes, I did.

12 Q And the FBI as well?

13 A That's correct.

14 Q How many times did you meet with the prosecutors and/or
15 the FBI?

16 A The same amount of times actually. I met with them in
17 person twice, then I also had a phone call with them.

18 Q Can you tell the ladies and gentlemen of the jury the
19 first time you met with the prosecutors?

20 A I believe, I mean it was very recently, I want to say
21 August of this year.

22 Q Let me see if I can refresh your recollection.

23 MR. DUBIN: May I approach, your Honor?

24 THE COURT: Yes.

25 Q Do you recall when you met with the FBI and the

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1 prosecutors, whether they were taking notes?

2 A Yes, they were taking notes.

3 Q And putting before you two things to see if this
4 refreshes your recollection about the dates.

5 THE COURT: Would you identify for the record what
6 you're showing the witness.

7 MR. DUBIN: I'm showing what I'll mark for
8 identification as GX3500MR-1A and GX3500-M R-2A.

9 THE COURT: Thank you.

10 Q Mr. Rosensaft, does that refresh your recollection when
11 you met with the prosecutors and the FBI for the first time in
12 this case?

13 A I see the dates. They are a little bit later, but it
14 doesn't refresh my recollection.

15 Q In any event, it was in sometime the fall of this year?

16 A Correct.

17 Q Did the prosecutors or the FBI show you any documents
18 during those meetings?

19 A Yes, they did.

20 Q They asked you questions about the documents and you gave
21 answers?

22 A Correct.

23 Q Now, do you recall the first time you heard the name
24 Martin Shkreli?

25 A It was either in the very late 2012 or early 2013.

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1 Q Without telling me the substance of any conversations,
2 who informed you about Martin Shkreli?

3 A Mr. Greebel.

4 Q How did that come about?

5 A Should I tell you the substance of the conversation?

6 Q Did he ask you any questions?

7 A Yes.

8 Q What did he ask you, just what he asked you?

9 A He asked me if I could help represent his clients in an
10 SEC investigation.

11 Q Do you recall whether this was in-person or on the
12 telephone, just if you recall?

13 A I believe the first, the very first contact was an
14 e-mail, but then we discussed it shortly thereafter in person.

15 Q Did you agree to do that?

16 A Yes.

17 Q In the context of that call, did Mr. Greebel ask you any
18 specific question?

19 A The only thing I remember is whether I could represent
20 his client.

21 Q At some point in time were you asked anything about
22 trading Retrophin?

23 A Yes.

24 Q And do you recall when that was?

25 A There were two times I was asked about trading.

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1 Q By whom?

2 A The first time was Mr. Greebel.

3 Q What did he ask you?

4 A His client --

5 MS. SMITH: Can we get a time period?

6 Q Do you recall approximately when that was?

7 A I believe it was early 2013 or maybe part of the way
8 through the year.

9 Q Okay. And what did Mr. Greebel ask you, that you recall?

10 A He told me that his client --

11 MS. SMITH: Objection to hearsay, your Honor.

12 THE COURT: I think he's asking you for questions
13 that Mr. Greebel asked, but not for statements that he made to
14 you, if you can distinguish those.

15 THE WITNESS: Sure.

16 THE COURT: Thank you.

17 A He asked me if I can give advice on trading that his
18 client -- Mr. Shkreli was doing.

19 Q Did you provide that advice?

20 A I did.

21 Q And did he ask you, did Mr. Greebel ask you if --

22 MS. SMITH: Objection to leading, your Honor.

23 THE COURT: Try to rephrase your question,
24 Mr. Dubin.

25 Q Did the questions Mr. Greebel ask have to do with the

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1 legality of the trading?

2 A Yes.

3 Q What did you tell Mr. Greebel?

4 MS. SMITH: Objection, your Honor. Hearsay.

5 THE COURT: Sustained.

6 MR. DUBIN: Your Honor, for the effect on the
7 listener and Mr. Greebel's state of mind.

8 MS. SMITH: Can we do a sidebar?

9 THE COURT: Yes.

10 (Continued on the next page.)

11 (Sidebar conference.)

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Sidebar Conference

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1 MR. DUBIN: Your Honor, I couldn't imagine a more
2 applicable exception to the hearsay rule than this. Here is
3 Mr. Greebel going and asking a question about whether or not
4 something is permissible under the law and one of his
5 colleagues telling is him that it is, and in his view in,
6 Mr. Rosensaft's view that it is, nothing can be more relevant
7 to Mr. Greebel's state of mind. It's just square within the
8 hearsay exception.

9 Let me correct the record, I misspoke. That
10 Mr. Rosensaft told Mr. Greebel that it was impermissible and
11 that he should communicate that to Mr. Shkreli.

12 MS. SMITH: I just don't know what trading we're
13 talking about and how it --

14 THE COURT: In order to make your, to be more clear
15 about, what questions he was asking about what particular
16 trades.

17 MR. BRODSKY: So the foundation would be Mr. Shkreli
18 came to Mr. Greebel said that I would like to trade a certain
19 way.

20 THE COURT: Of what?

21 MR. BRODSKY: Of Retrophin stock. Mr. Greebel
22 said -- well, Mr. Rosensaft --

23 MS. SMITH: This is not Rosensaft. This is double
24 hearsay.

25 MR. BRODSKY: If can finish.

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1 THE COURT: We're trying to get an answer to your
2 question.

3 MR. BRODSKY: I'd like to tell the complete story to
4 the Judge.

5 Mr. Greebel went to Mr. Rosensaft and said what
6 Mr. Shkreli said to him. Mr. Rosensaft said, I don't think
7 you can do that, but I should do some research. Mr. Rosensaft
8 did some research. Came back to Mr. Greebel and said, no, he
9 can't do that. Mr. Greebel said we should call Mr. Shkreli
10 and tell him he cannot do that. So I believe they both called
11 together. He called Mr. Shkreli and said, you cannot do that.
12 Mr. Shkreli said, okay, I won't do it.

13 THE COURT: What is "it"?

14 MR. BRODSKY: The "it," I believe what Mr. Rosensaft
15 testified to, is he would use the term painting the tape. I
16 believe what he means is a wash trade, where you buy 100
17 shares and you sell 100 shares on the same day intentionally
18 between two people. And so Mr. Rosensaft did research in that
19 and said that was not proper. And they told Mr. Shkreli
20 that's improper.

21 MS. SMITH: There is no allegation that there are
22 wash trades in this case. I don't know how it relates to
23 anything. There is no indication of what stock is being
24 traded.

25 MR. BRODSKY: It's Retrophin stock. It relates to

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1 Retrophin stock. The reason it's very relevant is that the
2 Government has alleged through Mr. Pierotti's testimony, if
3 you remember during Mr. Shkreli's trial, they said it was wash
4 trading.

5 THE COURT: During who's testimony?

6 MR. BRODSKY: Mr. Pierotti. He said there was a
7 plan to do what he described in general as wash trading.

8 THE COURT: Didn't your expert say there was no wash
9 trading?

10 MR. BRODSKY: Because we believe what happened was,
11 respectfully, is this question was asked of Mr. Rosensaft.
12 Mr. Rosensaft and Mr. Greebel told Mr. Shkreli, no, you cannot
13 do that; and Mr. Shkreli did not do it.

14 And so, to us, it's evidence of Mr. Greebel's state
15 of mind. He spots a problem, potential wrongdoing or
16 potential issue with respect to what Mr. Shkreli's plan is in
17 trading of Retrophin stock, he goes to Mr. Rosensaft, an
18 expert in the field, Mr. Rosensaft does research comes back.

19 THE COURT: You can't represent him as an expert.
20 He's got narcotics money laundering and international
21 terrorism, that's not an expert in securities.

22 MR. BRODSKY: I'm not suggesting an expert in that
23 sense.

24 Mr. Rosensaft does research, comes back, and says,
25 no, you can't do it. They tell Mr. Shkreli you can't do it,

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1 which goes to Mr. Greebel's state of whined, which is that he
2 is trying to stop Mr. Shkreli from doing something that's not
3 proper in connection with Retrophin stock.

4 THE COURT: So the inference is that Mr. Greebel
5 would ask for some guidance, if he believed Mr. Shkreli had a
6 question, that was beyond his expertise and he would go to a
7 former prosecutor to ask questions. And based on those
8 answers he would advise his client accordingly.

9 MR. BRODSKY: He would do it with, he did it with
10 Mr. Rosensaft to tell Mr. Shkreli don't do it.

11 MR. DUBIN: I'm going to get to that.

12 MR. BRODSKY: Mr. Shkreli agreed not to do it. So
13 to us it's good faith intent in a conspiracy theory, under
14 Count Eight, there is an alleged conspiracy that Mr. Greebel
15 and Mr. Shkreli and others wanted to manipulate the price of
16 Retrophin securities. This evidence demonstrates that it's
17 the exact opposite with respect to Mr. Greebel's intent.
18 Which is, when Mr. Greebel learned of a red flag, of an issue,
19 he brought it to somebody who is a former prosecutor, the
20 former prosecutor researched it, said, no, it's not right.
21 And he called, I believe it's with --

22 MR. DUBIN: I'm going to ask him.

23 MR. BRODSKY: I don't want to proffer for your Honor
24 exactly how the testimony would come out, my understanding is
25 on prior conversations with Mr. Rosensaft, Mr. Rosensaft will

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1 say he called with Mr. Greebel. Mr. Rosensaft has described
2 himself as sort of somebody that Mr. Greebel came to as sort
3 of like a policeman when an issue came up.

4 THE COURT: He didn't say that.

5 MR. BRODSKY: Not yet, I'm proffering to your Honor
6 what I believe the testimony will show.

7 THE COURT: He's the securities expert, not
8 Mr. Rosensaft.

9 MR. BRODSKY: One is corporate securities, which is
10 completely different than litigation-type securities. So
11 there is corporate securities, filing SEC forms, representing
12 a corporation. Then there is a specialized practice of
13 litigation within the Securities & Exchange Commission where
14 it's a different area. Corporate securities lawyers won't
15 know the area within what the litigators will know and this is
16 a litigation area.

17 So Mr. Rosensaft did research in the litigation
18 area.

19 THE COURT: Okay.

20 MR. PITLUCK: It sounds like they want to elicit a
21 double hearsay conversation that Mr. Greebel had with
22 Mr. Shkreli that was then relayed to Mr. Rosensaft in a very
23 generalized period of time, sometime in the first six months
24 of 2013, about trades that are generally related to Retrophin
25 stock, that have absolutely no connection, that he's proffered

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1 at this point, to the charged conduct to which they don't know
2 if the defendant participated with Mr. Shkreli, likely another
3 hearsay conversation, for the general effect that it had on
4 Mr. Greebel in an amorphous period of time unrelated to the
5 charges.

6 This is creating an exception that you could drive a
7 truck through. On the general theory because he took one
8 issue to a lawyer, or he says he took an issue to a lawyer,
9 that it's then affected on the state of mind, it negates his
10 intent to unrelated charges.

11 MS. SMITH: If it would come in on such a limited
12 fashion, not what Mr. Shkreli said to Mr. Greebel, it would
13 have to be what advice --

14 THE COURT: So far all we have is the question that
15 Mr. Greebel asked of Mr. Rosensaft.

16 MS. SMITH: I'm concerned, this is part of what we
17 briefed last night. Even if it comes in under one of these
18 exceptions, we need a limiting instruction not offered for the
19 truth of what happened or was told. It needs to come in in a
20 narrow fashion.

21 I don't think what Mr. Shkreli told Mr. Greebel,
22 which was relayed to Mr. Rosensaft, there is an exception that
23 fits that. It has to be what Mr. Rosensaft conveyed to
24 Mr. Greebel.

25 THE COURT: Just between the two of them.

Sidebar Conference

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1 MS. SMITH: Just between the two of them. It would
2 need to be a limited instruction how it's not offered for the
3 truth, offered for the fact that, the effect, if any, on what
4 Mr. Greebel heard.

5 THE COURT: The part that is going to be
6 problematic, that I foresee, whether or not Mr. Rosensaft was
7 involved in conveying the information back to Mr. Shkreli. If
8 he wasn't involved and has no personal knowledge, that can't
9 be elicited. The only way he would know that would be
10 hearsay.

11 MS. SMITH: But even the conversation between
12 Mr. Greebel and Mr. Shkreli is hearsay and doesn't come in.

13 THE COURT: Yes. So the question could be posed, so
14 far we're right at that point, that Mr. Greebel came with a
15 question to Mr. Rosensaft.

16 MS. SMITH: What was the question? Because the
17 question --

18 THE COURT: I think it did come in.

19 MR. DUBIN: It did come in.

20 THE COURT: Then Mr. Rosensaft gave a response back
21 to Mr. Greebel, period.

22 MR. DUBIN: Then I'll tell what you comes next.
23 There was a call that Mr. Rosensaft and Mr. Greebel are on in
24 conveying the advice to Mr. Shkreli. I'm not going to into
25 other conversations that Mr. Greebel had with Mr. Shkreli.

Sidebar Conference

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1 I'm going to ask him what he conveyed to Mr. Shkreli.

2 THE COURT: What Mr. Rosensaft conveyed.

3 MR. DUBIN: To Mr. Greebel on the phone.

4 THE COURT: But not what Mr. Greebel said to
5 Mr. Shkreli. What Mr. Rosensaft said to Mr. Shkreli.

6 MS. SMITH: With Mr. Greebel on the phone. We want
7 the limiting instruction that this is not offered for the
8 truth of anything but for the effect.

9 This is part of what we briefed yesterday. We can't
10 get all sorts stuff far afield in just because there is this
11 particular thing.

12 MR. DUBIN: I'm trying to stream line this. That's
13 why I'm asking him about questions, I want to move this along
14 quickly.

15 THE COURT: Now that you know the parameters, we'll
16 trust you to adhere to them. We will then make sure that we
17 instruct the jury, I guess, at this point that the statements
18 are being offered not to not for the truth but to establish
19 Mr. Greebel's state of mind.

20 MS. SMITH: Okay.

21 THE COURT: State of mind.

22 MS. SMITH: That's fine.

23 (End of sidebar conference.)

24 (Continued on the next page.)

25

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1 THE COURT: Members of the jury, this line of
2 questioning and the answers you may hear, the answers, as you
3 know are evidence not the question. You may consider both in
4 the context of the evidence before you.

5 So the answers to these questions are not being
6 offered for the truth, but rather to establish the effect on
7 the listener.

8 MR. DUBIN: May I proceed?

9 THE COURT: Yes.

10 MR. DUBIN: Thank you.

11 BY MR. DUBIN:

12 Q By the way, when you and Mr. Greebel had this discussion
13 was it a long or short discussion, if you recall?

14 A It was I would say ten-minute discussion.

15 Q Did you conduct any legal research after the call.

16 A I did.

17 Q Did there come a point in time when you and Mr. Greebel
18 conveyed information to Mr. Shkreli on a call that you
19 remember?

20 A We conveyed a lot of information to Mr. Shkreli on calls.

21 Q Let me be more specific, Mr. Rosensaft. In connection
22 with that advice, did there come a time when you conveyed that
23 advice or the results of your research about the trading or
24 the proposed trading to Mr. Greebel -- to Mr. Shkreli with
25 Mr. Greebel on the phone.

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1 A Yes.

2 Q Can you tell the ladies and gentlemen of the jury the
3 advice you gave him?

4 A The question concerned whether Mr. Shkreli and others
5 that he knew could trade stock to each other essentially. And
6 the advice I gave was that that could be considered what is
7 known as wash trades. So if Mr. Shkreli is trading with other
8 people that he knows, it could create a false sense in the
9 market that there is a lot of trading going on when, it's
10 really just him trading with other people. So my advice was
11 that's not a good idea. That's something that the SEC could
12 look into and may decide to investigate.

13 Q Now did Mr. Greebel ever do anything that indicated to
14 you that he disagreed with your advice?

15 A No.

16 Q Did Mr. Shkreli, as far as you know, take that advice?

17 MS. SMITH: Objection, your Honor.

18 THE COURT: Sustained.

19 Q Did Mr. Shkreli have a reaction to what you told him?

20 MS. SMITH: Objection, your Honor to hearsay.

21 Q That he articulated to you?

22 THE COURT: Sustained.

23 Q From your understanding, did Mr. Shkreli agree to take
24 your advice?

25 MS. SMITH: Objection to hearsay.

Rosensaft - Direct - Dubin

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1 THE COURT: Sustained.

2 Q I'll move on.

3 Did there come a time when you started to represent
4 MSMB in connection with an SEC investigation?

5 A Yes.

6 Q Do you recall when that was?

7 A I believe it was early 2013.

8 Q Let me see if I can refresh your recollection of the
9 date. Go to tab one of your binder, I can put it on the
10 screen, it's in evidence. GX842, do you recognize this to be
11 a cover letter for a bill? Flip through it.

12 A I can see it is a cover letter for a bill, although I
13 don't remember the specific bill.

14 Q Go to -- to see if it refreshes your recollection -- if
15 your Honor wishes, I take it off the screen?

16 THE COURT: It's in evidence that's fine.

17 Q Bates stamp 48567 and take a look at the May 13 time
18 entry that bears your name. Does that refresh your
19 recollection that it was in the spring of 2013 that you first
20 came to learn of the SEC investigation?

21 A I see the time entry, but my recollection was it was
22 early 2013.

23 Q Okay. And fair to say that you might just be mistaken as
24 to when it actually happened?

25 A Sure, it's possible.

Rosensaft - Direct - Dubin

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1 Q That time entry says, "Call with E. Greebel to discuss
2 SEC subpoena, review subpoena, call with SEC to discuss
3 investigation and time table." Sitting here today do you
4 recall that conversation at all?

5 A I recall the initial conversation with Mr. Greebel, if
6 this is referring to that, I do recall that.

7 Q Do you recall receiving the actual -- strike that.

8 The do you recall receiving a subpoena from the SEC,
9 a copy of a subpoena that the SEC served?

10 A I received many subpoenas from the SEC during the time I
11 worked on MSMB Capital.

12 Q If you can take that off the screen.

13 I'm showing you tab two, marked for identification
14 DX202-one, if you just flip through that I want to see if that
15 refreshes your recollection as to the time frame regarding
16 when you received the first subpoena related to this matter?

17 A I see the date on the subpoena. I can't be sure this is
18 the first subpoena or not.

19 Q Okay. And this was sent to you by Mr. Greebel, correct?
20 Actually is this an e-mail on May 13, 2013 at 2:58 p.m., from
21 Mr. Greebel to you?

22 A Yes.

23 Q It attaches the subpoena, correct?

24 THE COURT: I'm sorry, is this in evidence?

25 MR. DUBIN: I was going to move it into evidence.

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1 MS. SMITH: We don't have a copy of it.

2 MR. DUBIN: It's in your binder.

3 Do you mind if I lay the foundation?

4 THE COURT: Yes.

5 BY MR. DUBIN:

6 Q This is an e-mail sent to you by Mr. Greebel on May 13 at
7 2:58 p.m., correct?

8 A Correct, that's in the chain.

9 Q And there is an attachment to the e-mail, correct?

10 A There is an attachment to the top e-mail. I'm not sure
11 if it was also attached to the lower e-mails, although the
12 subject matter seems to indicate it was.

13 MR. DUBIN: I move DX202-1 into evidence, your
14 Honor.

15 MS. SMITH: We have an objection as to authenticity.

16 THE COURT: Do you want to try to establish or meet
17 her concerns?

18 Q You see, sir, that is your e-mail address at Katten,
19 correct?

20 A That's my name, that's an e-mail that was sent by me to
21 Mr. Gordon.

22 Q You see that was sent -- do you recall sending this
23 e-mail or do you recall the e-mail as you see it?

24 A Yes.

25 Q And that is a true and accurate copy of the e-mail that

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1 you sent, correct?

2 A Correct.

3 MR. DUBIN: I move it into evidence.

4 THE COURT: We will admit Defendant's Exhibit 202-1.

5 (Defendant's Exhibit Number 202-1 so marked and

6 received in evidence.)

7 Q If we scroll down to the bottom e-mail, you see it says
8 from Retrophin scanner at Retrophin.com?

9 A Yes.

10 Q Had you received documents from the Retrophin scanner?
11 Do you know what that is?

12 A I don't. I don't remember that specifically.

13 Q Do you ever receive documents at Katten that comes from a
14 scanner, that's the scanner's e-mail address?

15 THE COURT: For anything?

16 MR. DUBIN: Just generally.

17 A I don't believe so.

18 Q Not important.

19 So to Martin Shkreli. You see then that it says
20 subject scanned from Retrophin, right?

21 A Correct.

22 Q Then that is forwarded, if you go to the e-mail above it,
23 forwarded from Mr. Shkreli to Mr. Greebel at 11:45, right?

24 A Correct.

25 Q And if you go up then what Mr. Greebel appears to do is

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1 to forward it to you, right?

2 A Yes, he forwards me the part below it.

3 Q And can you please just read to the jury, you see there
4 is an attachment at the top e-mail that you then send some
5 questions on the e-mail with the attachment to Michael Gordon
6 and Mr. Greebel, correct?

7 A I copy Mr. Greebel and sent it to Michael Gordon.

8 Q Why did you send it to Michael Gordon directly and only
9 copy Mr. Greebel as opposed to sending it just to Mr. Greebel?

10 A Mr. Gordon was handling litigation for the client MSMB.
11 And it was my understanding that in that litigation he had
12 already received documents from MSMB. So one of the places I
13 was looking for documents in responding to the subpoena was
14 from Mr. Gordon, things we already had.

15 Q And can you please explain, can you read the e-mail to
16 the jury?

17 A "Basically we need, one, all e-mails to Rothstein; two,
18 all periodic reports to limited partners; and three, all info
19 re: OREX trades and ML arbitration."

20 Q You know what the ML arbitration is, right?

21 MS. SMITH: Leading.

22 THE COURT: Sustained.

23 MR. DUBIN: Withdrawn.

24 Q Do you know what ML stood for?

25 A Yes.

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1 Q What it does stand for?

2 A Merrill Lynch.

3 Q Tell the ladies and gentlemen of the jury what you knew
4 about the Merrill Lynch arbitration at that time?

5 A I don't remember exactly if I learned it at this time or
6 when I exactly learned it, although, it was early in the
7 representation of MSMB Capital, but there was an arbitration
8 between Mr. Shkreli and Merrill Lynch related to trades he
9 placed in the security OREX, O-R-E-X, that was resolved before
10 I started working on the case.

11 Q Could we go to the first page of attachment, please
12 Mr. Carter, and what is that, sir?

13 A A subpoena from the Securities Commission.

14 Q It says "In the matter of MSMB Capital Management LLC
15 valuation," can explain what that line signifies?

16 A It's the name of the SEC's investigation.

17 Q If you go to the next page, keep scrolling down, it is
18 addressed to Martin Shkreli and it's addressed to him at
19 Retrophin Inc., right?

20 A Correct.

21 Q Did you have an understanding as to if Martin Shkreli ran
22 any other entities out of that address?

23 A Yes, there were at least two MSMB entities, MSMB Capital,
24 and MSMB Healthcare, and he also ran Retrophin out of that
25 same address.

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1 Q If you go down, stay right there, it says, just to go
2 through it quickly, it's asking Mr. Shkreli to produce certain
3 documents and that he needs to testify before the SEC,
4 correct?

5 A Yes.

6 Q Now, why don't you go to the next page to show the jury
7 what the subpoena looks like. That's the attachment. It
8 contains some definitions, correct?

9 A Correct.

10 Q Fairly standard in your experience?

11 MS. SMITH: Objection to leading, your Honor.

12 Q Was it standard in your experience?

13 THE COURT: Still leading but I'll allow it. Avoid
14 leading questions.

15 MR. DUBIN: Sorry, trying to move it.

16 Q Go down --

17 THE COURT: Did you want him to answer the question?

18 Q Sure. If can you go back to the top, can you read to the
19 jury what that top line says?

20 A "Attachment to subpoena dated May 2, 2013, to Martin
21 Shkreli. Definitions, construction, and instructions."

22 (Continued following page.)

23

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1 BY MR. DUBIN:

2 Q Okay. Could you go to the next page, please?

3 And can you read the heading there for the jury,
4 please.

5 A Documents To Be Produced.

6 Q Okay. And based on your experience, Mr. Rosensaft,
7 were the requests the SEC was making common or uncommon; did
8 you have a view on it?

9 A Well, it's common for the SEC to make a request.

10 Q Okay. That was really my question.

11 A I mean, of companies that I investigated.

12 Q These type of requests, the requests listed in
13 *subpoena*?

14 A Every *subpoena* is different.

15 Q And in your experience, the *subpoenas* asks what; what
16 do *subpoenas* often ask for in SEC investigations that you
17 handled, just generally speaking.

18 A Still depends on the *subpoena*, for the documents.

19 Q Documents, okay.

20 Now, what did you do next in connection with the
21 SEC investigation?

22 A I had a number of meetings with Mr. Shkreli, and I
23 tried to gather the documents that were responsive to the
24 *subpoena*.

25 Q Okay. Did Mr. Greebel attend every meeting that you

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1 had with Mr. Shkreli?

2 A No.

3 Q And did he ever indicate to you in any way that he
4 needed to be there any time you met with Mr. Shkreli?

5 MS. SMITH: Objection to leading, Your Honor.

6 THE COURT: Sustained.

7 BY MR. DUBIN:

8 Q Did Mr. Greebel ever attempt to interfere with your
9 ability to meet with Mr. Shkreli in any way?

10 A No.

11 Q How long, just generally speaking, were these meetings
12 with Mr. Shkreli that you had; did they range?

13 MS. SMITH: Objecting to leading, Your Honor.

14 Q When do you remember the first time that you meet with
15 Mr. Shkreli?

16 A It was shortly after I started on the case, I would say
17 within two weeks.

18 THE COURT: When you say after you started on the
19 case, is that in reference to May 23rd, the *subpoena*?

20 THE WITNESS: To my best recollection, it's the
21 beginning of 2013.

22 Q Now, did you come to learn whether or not that was the
23 first request for information or the first *subpoena* to
24 Mr. Shkreli?

25 A It was not.

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1 Q Okay. And can you tell the Ladies and Gentlemen of the
2 Jury, if you came -- well, strike that.

3 Did you learn that he had been contacted before
4 your representation of him?

5 A By the SEC, yes.

6 Q And who was representing Mr. Shkreli in connection with
7 that, if you know?

8 A No one was.

9 Q Okay. Was he representing himself?

10 A He was interfacing with the SEC himself.

11 Q And so just to be clear, he did not have counsel, as
12 far as you knew?

13 MS. SMITH: Objection to leading Your Honor.

14 THE COURT: Sustained.

15 Q Did he have counsel as far as you knew?

16 MS. SMITH: Objection, asked and answered.

17 THE COURT: All right. Sustained.

18 Please move on.

19 MR. DUBIN: Okay.

20 Q After meeting with Mr. Shkreli -- well, let me ask you,
21 did you ever review any documents -- did you ever review
22 anything that Mr. Shkreli received prior to receiving that
23 subpoena that we just showed in evidence as Defense
24 Exhibit 202-1?

25 MS. SMITH: Objection, Your Honor. Form.

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1 MR. DUBIN: Let me clarify it, Your Honor.

2 Q Prior to receiving the *subpoena* that we just went
3 through in May of the 2013, did you ever review any other
4 *subpoenas* that Mr. Shkreli ever received prior to that?

5 A I do not have a specific memory of that.

6 Q Okay. Let me see if I can refresh your recollection.
7 If you turn to Tab 3 in your binder, and I'm going to show
8 you what I have marked for identification as Defense
9 Exhibit 4747-A. And I just want you to read that to
10 yourself and see if you recall receiving that or ever
11 reviewing it?

12 A I do remember this document.

13 Q Okay. I would move DX 4747-A into evidence,
14 Your Honor.

15 MS. SMITH: Your Honor, we have an objection. But
16 could we have a brief sidebar?

17 THE COURT: Yes.

18 MR. DUBIN: You know what, Your Honor? I'll
19 withdraw it.

20 MS. SMITH: No objection to the document coming
21 in. We just need a brief sidebar.

22 THE COURT: All right. Excuse us.

23 (Continued on next page.)
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Sidebar Conference

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1 (The following occurred at sidebar.)

2 MS. SMITH: Your Honor, I am just putting on the
3 record that we had a potentially half hour to 45-minute
4 sidebar when the defense attempted to seek this document
5 out. So we have no objection to it coming in. Having it
6 come in, we tried to slip the document in, and I just -- I
7 just felt that that was necessary to note for the record
8 because we really did have an extensive, extensive sidebar
9 with defense objecting to this.

10 MR. PITLUCK: With the case agent.

11 MS. SMITH: With the case agent.

12 THE COURT: Right.

13 MR. DUBIN: Our problem is, though, that we
14 objected very strongly at sidebar to the admission of both
15 documents. Then the Government finished with their case
16 agent, and we decided to put on our case in chief. And
17 having considered all the evidence, we then became fearful
18 that because the Government had put in the document that was
19 responsive by Mr. Shkreli, having reviewed it, we thought an
20 impression was going to be created that Mr. Greebel was
21 aware of it.

22 We became really concerned, because there was no
23 evidence that he was ever aware of it. And we felt that if
24 we put on a case in chief, then we should put in both of
25 them because we just became concerned that there would be

Sidebar Conference

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1 some sense from just Mr. Shkreli's response that the initial
2 request would have come from Mr. Greebel because he was
3 counsel to MSMB and we just became concerned about it.

4 MS. SMITH: I just wanted to put that on the
5 record, Your Honor.

6 THE COURT: Yes.

7 MR. DUBIN: Thank you.

8 (Continued on next page.)
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1 (Sidebar ends; in open court.)

2 THE COURT: You may proceed.

3 MR. DUBIN: Thank you, Your Honor.

4 So I will move DX 4747-A into evidence,

5 Your Honor.

6 THE COURT: Any objection?

7 MS. SMITH: No, none.

8 THE COURT: All right. We will receive in

9 evidence Defense Exhibit 4747-A.

10 (Defendant's Exhibit Number 4747-A so marked and
11 received in evidence.)

12 BY MR. DUBIN:

13 Q So is this the document that you recall reviewing, sir,
14 reflecting Mr. Shkreli's initial contact with the SEC?

15 A Yes.

16 Q Okay.

17 MR. DUBIN: And if we could just below up the top
18 portion of the e-mail?

19 Thank you, Mr. Carter.

20 Q And who is Eric Schmidt?

21 A He was the SEC attorney that was handling the
22 investigation primarily.

23 Q And it was sent directly to Martin Shkreli; is that
24 right?

25 THE COURT: Please don't lead.

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1 A Correct.

2 THE COURT: Please don't lead.

3 MR. DUBIN: Okay.

4 Q Who was it sent to?

5 A Mr. Shkreli.

6 Q And is anyone copied on that e-mail?

7 A No.

8 Q Okay. And if you can go to the first page of the
9 attachment? Can you please read for the jury -- by the way
10 that address, do you recognize that address at the top,
11 330 Madison Avenue?

12 A I do not.

13 Q Okay. And do you know one way or another whether MSMB
14 moved offices at some point, if you know?

15 A I don't remember.

16 Q Okay. And if you go down, who is this addressed to,
17 this letter?

18 A Mr. Shkreli.

19 Q And will you read just the first paragraph for the
20 jury?

21 A "The staff of the United States Securities and Exchange
22 Commission is conducting an informal investigation in the
23 above-referenced matter to determine whether there had been
24 violations of the federal securities laws. In connection
25 with this investigation the staff requests that MSMB as

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1 defined in the attached document request, voluntarily
2 produce the documents and information described in the
3 attachment by October 16, 2012.

4 Q Okay. And can you go to the last paragraph.

5 A (Witness complies.)

6 Q I'll read that one. It says, The staff request MSMB
7 produce all documents in electronic searchable form. The
8 staff requests that any electronic production be in
9 accordance to the attached SEC status delivery standard.

10 Do you see that, sir?

11 A Yes.

12 Q Have you in your experienced received similar, such
13 letters in your representation of clients being investigated
14 by the SEC?

15 A Yes.

16 Q Okay.

17 Now I would like to show you what I will mark for
18 identification as Tab 4 of you binder DX4868.

19 A All right:

20 Q And do you recall also reviewed this document, sir?

21 A I do not.

22 Q Okay. And do you -- can you turn to the next page?

23 A (Witness complies.)

24 Q See if that refreshes your recollection. I just ask
25 you to read through it.

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1 A I don't have a specific memory of that.

2 Q Okay. Did you come to learn at some point that
3 Mr. Shkreli had responded on his own to the SEC requests for
4 information that we just saw in DX 4747-A?

5 A Yes.

6 Q Okay. Had you ever had a client prior to your
7 representation of Mr. Shkreli represent himself in an SEC
8 investigation?

9 A Well, I started at the firm in 2012 of November. So
10 before that, I was at the U.S. Attorney's Office. I didn't
11 have clients, other than the Government. And as an
12 associate at Cleary Gottlieb, I hadn't had a client who
13 represented him or herself.

14 Q Did they always have counsel, in your experience, prior
15 to that?

16 MS. SMITH: Objection.

17 THE COURT: Sustained.

18 Refresh if you would like.

19 MR. DUBIN: Sure.

20 Q Well, who represented those clients in your experience?

21 THE COURT: At Cleary?

22 MR. DUBIN: At Cleary, yes.

23 Q Or -- yeah. Prior to coming to Katten?

24 A Other lawyers.

25 Q Okay.

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1 All right. Now, did there come a time when you
2 gathered documents in response to the *subpoena*?

3 A Yes.

4 Q Okay. And I'm talking just for the jury's benefit, the
5 *subpoena* that you actually received in May of 2013.

6 A Okay.

7 Q All right.

8 And can you tell the jury what you did to respond
9 to that *subpoena*?

10 A I spoke to Mr. Shkreli, and I spoke to him about
11 retrieving responsive documents. I spoke to his
12 partner/colleague, Marek Biestek, who is the MB in MSMB
13 about retrieving documents. And then I also spoke to
14 Mr. Gordon at our firm because he had already received some
15 documents in connection with his representation in the
16 litigation.

17 Q Okay. So at this point in time, in May of 2013, who
18 was your client?

19 A MSMB Capital.

20 Q Okay. And other than gathering the documents together
21 in response to SEC *subpoena*, can you just give the jurors a
22 general overall review of what your role was; what was the
23 scope of your reputation was?

24 A My role was to represent MSMB Capital in front of the
25 SEC to find out as much about their investigation as I could

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1 and try to resolve it and to respond to the SEC's request
2 for information.

3 Q Mr. Shkreli, did Mr. Greebel have any role whatsoever
4 in assisting your gather and analyzing documents to respond
5 to that SEC *subpoena*?

6 MS. SMITH: Objection to leading, Your Honor.

7 THE COURT: Overruled.

8 A Not that I remember.

9 Q Okay. And did Mr. Greebel have any role in deciding
10 what documents were responsive to that *subpoena*?

11 A No.

12 Q Whose responsibility was that?

13 A Mine.

14 Q Did Mr. Greebel have any role whatsoever in
15 communicating with the staff of the SEC?

16 A No.

17 Q Okay. And whose role was that?

18 A Mine as well.

19 Q All right. Well, how would you communicate with the
20 SEC?

21 A I had phone calls with them, e-mails, and then I met
22 with them in person as well.

23 Q Okay. And the phone calls, e-mails, and meetings that
24 you had with the SEC, did Evan Greebel ever participate in
25 those?

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1 A No.

2 Q Were there times when you called Martin Shkreli during
3 your gathering documents to respond to the *subpoena*?

4 A Yes.

5 Q Did you check with Evan Greebel before you called him?

6 A Not that I remember.

7 Q Okay. Well, why not?

8 A Because I was the one responsible for gathering the
9 documents. Evan represented the client brother matters, but
10 he was not working on the SEC investigation.

11 Q Now, did there come a point in time when you met with
12 Martin Shkreli to prepare him for his testimony before the
13 SEC?

14 A Yes.

15 Q Okay. And do you recall when that was?

16 A It was shortly before his testimony or the weeks
17 leading up to his testimony. His testimony, I believe, was
18 August of 2013, so I met with him, I would say, June and
19 July of 2013.

20 Q Okay. And did Evan Greebel go with you to that first
21 meeting?

22 A I believe he did go with me to the first meeting.

23 Q Do you recall whether or not he had a preference of
24 whether or not to attend those meetings?

25 MS. SMITH: Objection, Your Honor.

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1 THE COURT: Sustained.

2 Q Well, let me show you under -- actually, I'm going to
3 hand this one up to you if you don't mind because it's a
4 stamped copy.

5 MR. DUBIN: May I approach, Your Honor?

6 THE COURT: Yes.

7 MR. DUBIN: Okay.

8 Q I am handing you I will mark for identification as DX
9 202-21. I'll ask you to review the e-mail in front of you,
10 Mr. Rosensaft.

11 A (Witness complies.)

12 Q Do you see this is an e-mail from you to Mr. Shkreli
13 copying Mr. Greebel in the summer of 2013?

14 A The bottom e-mail, the chain is.

15 Q Right. July 22nd at 3:28 p.m. By the way, that's
16 Eastern Standard Time there, right?

17 A Yes.

18 Q Okay. And do you recall Mr. Greebel responded to you
19 e-mail?

20 A I don't recall the specific response or the specific
21 e-mail.

22 Q Okay. But in any event, Mr. Greebel asked -- appears
23 to ask you a question and you appear to respond; is that
24 correct?

25 A Correct.

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1 Q Okay.

2 MR. DUBIN: I would move DX 202-21 into evidence,
3 Your Honor.

4 MS. SMITH: Your Honor, can we have a brief
5 sidebar on the document?

6 THE COURT: Yes. Excuse us.

7 (Continued on next page.)
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Sidebar Conference

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1 (The following occurred at sidebar.)

2 MS. SMITH: Your Honor, I am just not sure that
3 this document was ever produced to us. It doesn't have a
4 Bates Stamp, and they produced a bunch of documents for us
5 on Saturday, and I don't have a recollection of this being
6 within those documents. And so I would ask that -- you
7 know, we're trying to conform with all of the details. I
8 don't believe that we've seen it. We went -- I went through
9 all the documents that were produced to us.

10 THE COURT: Assuming it's -- no one can confirm
11 that it was -- what is your request.

12 MS. SMITH: Pursuant to Rule 16, again, this is a
13 document without a Bates Stamp. They've had it in their
14 possession for I don't know how long. They did produce to
15 us some documents without Bates Stamps on Saturday. If this
16 is among them, I would be -- I would be mistaken, but I
17 honestly do not remember seeing this, and I cannot confirm
18 if we actually ever received it, and we ask that it be
19 included under Your Honor's rule, which is that if they
20 produce any documents, they were going to get them to us
21 prior to introduction.

22 MR. BRODSKY: Your Honor, I'm sorry. We did not
23 include this in our production --

24 THE COURT: Okay.

25 MR. BRODSKY: -- when we gave the marked

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1 documents.

2 MR. DUBIN: I'll just ask him if it refreshes his
3 recollection.

4 MR. PITLUCK: Well, he just said he doesn't
5 recall, Judge.

6 MR. DUBIN: Yeah, not the email. But I'm going to
7 ask him if it refreshes his recollection whether Mr. Greebel
8 had a preference. He said he didn't remember.

9 MR. PITLUCK: Okay.

10 MR. BRODSKY: One way or the other.

11 MR. DUBIN: One way or the other.

12 THE COURT: A preference about what?

13 MR. DUBIN: Attending prep sessions.

14 THE COURT: Mr. Greebel's question, Do you need me
15 there?

16 MR. DUBIN: Right.

17 THE COURT: And he says no.

18 MR. DUBIN: Right. In other words, Do you need me
19 there?

20 MR. PITLUCK: What preference is being expressed
21 in the question, Judge?

22 MR. DUBIN: I will phrase it differently.

23 MS. SMITH: Well, how are you going to rephrase
24 it? I don't think it's -- he doesn't recall.

25 MR. BRODSKY: Does this refresh your recollection

Sidebar Conference

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1 one way or the other whether or not Mr. Greebel expressed
2 whether he wanted to attend or didn't want to attend the
3 meeting? This may refresh -- you can use anything to
4 refresh your recollection. So we can use a napkin, or we
5 can use --

6 THE COURT: I know. You have given me that
7 lecture. I understand, Mr. Brodsky. Thank you. Okay?

8 The question is whether it was produced. If it
9 wasn't, I told you it would be precluded, so it's precluded.

10 Now, whether you want to ask the question
11 whether -- to refreshes his recollection about whether or
12 not Mr. Greebel asked if he needed to be there.

13 MR. BRODSKY: Or not.

14 THE COURT: It's not a preference.

15 MR. BRODSKY: Understood, Your Honor.

16 MR. DUBIN: Understood.

17 THE COURT: All right.

18 MR. PITLUCK: Judge, the way that you rephrased
19 it, we're fine with.

20 THE COURT: Okay.

21 (Continued on next page.)
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1 (Sidebar ends; in open court.)

2 BY MR. DUBIN:

3 Q Mr. Rosensaft, does this refresh your recollection
4 about whether or not Mr. Greebel ever expressed to you that
5 he even needed to be there or not or didn't need to be
6 there?

7 A Well, I do have a specific memory of that. I don't
8 need my recollection refreshed.

9 Q Okay. You tell us what your recollection is.

10 A Generally, Mr. Greebel was at the first meeting while I
11 was getting introduced to the client. But he never
12 expressed any desire to be at future meetings unless I
13 needed him.

14 Q Okay. Now, when -- did Mr. Shkreli make
15 representations to you -- without telling us what the
16 substance is, did Mr. Shkreli make representations --
17 certain representations to you about documents or facts
18 related to the SEC matter?

19 A Sure.

20 Q And did you accept his representations?

21 A Unless I had a reason to doubt it, yes.

22 Q Okay. And so why did you accept his representations?

23 A He's my client. I'm looking out for his interest.
24 Unless I'm shown otherwise, I take his representation. If
25 anything seemed like it could be questionable in what he's

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1 telling me, I do my best in trying to find out if that may
2 or may not be true. But as a general matter, I think his
3 representation -- I take his representations as true.

4 Q Okay. And at some point did you have a conversation
5 with the SEC staff about the *subpoena*?

6 A Yes.

7 Q Okay. Now, regarding Retrophin -- well, strike that.
8 Were you responsible for sending out bills to
9 Retrophin in connection with this matter?

10 A No, I was not.

11 MS. SMITH: Objection, Your Honor.

12 THE WITNESS: I'm sorry.

13 MS. SMITH: To Retrophin?

14 BY MR. DUBIN:

15 Q To Martin Shkreli or MSMB?

16 THE COURT: Or Retrophin?

17 BY MR. DUBIN:

18 Q Or Retrophin?

19 THE COURT: Okay.

20 Q Were you responsible for sending those out to anyone?

21 A Not in connection with my work in this matter.

22 Q Now, after you collected the documents in response to
23 the SEC *subpoena*, what did you do with them?

24 A I reviewed them.

25 Q Okay. And did there come a time when you met with the

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1 SEC to discuss the documents that were responsive to the
2 subpoena?

3 A Well, I meet with the SEC very early on to try to find
4 out as much about their investigation as I could.

5 Q And do you recall when that was?

6 A I don't remember. I don't remember exactly, but it was
7 very early in my representation of MSMB.

8 Q Well, let me see if I can refresh your recollection
9 about one of the times that you met with them. If you go to
10 Tab 6 in your binder --

11 MR. DUBIN: And you can put it up on the screen,
12 because it's in evidence --

13 Q GX 857-A please -- well, I'll just ask you to take a
14 look at the document?

15 MR. DUBIN: Is the Elmo on?

16 THE COURTROOM DEPUTY: Yes, it's on.

17 THE COURT: Well, put the document on the blank
18 screen.

19 MR. DUBIN: Understood, Your Honor. I just didn't
20 know it would happen that fast.

21 THE COURT: Excuse me?

22 MR. DUBIN: I didn't know it would happen that
23 fast.

24 THE COURT: When the light goes on, it's on.

25 MR. DUBIN: It's magic.

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1 THE COURT: Yes, magic.

2 BY MR. DUBIN:

3 Q Let me show you a -- we've highlighted some entries:
4 I'm showing you what's already in evidence as GX 857-A.

5 Do you see that, sir?

6 A Yes.

7 Q And this is a September 30, 2014 cover letter to a
8 bill, correct?

9 A Yes.

10 Q All right. And I'll show you ending in Bates Stamp
11 129 -- 49129.

12 A Okay.

13 Q And can you just read for the jury some of the dates
14 and the entries on this page that are highlighted?

15 A Do you want me to read all the highlighted?

16 Q Why don't you read every other one so we don't have to
17 go through all of them.

18 A All right.

19 June 4, 2013, Michael M. Rosensaft, meeting with
20 M. Shkreli and E. Greebel to discuss investigation.
21 Research on SEC actions regarding short locate and close-out
22 requirements.

23 June 11, 2013, Michael M. Rosensaft, review recent
24 SEC cases -- I guess I should say the hours. The first one
25 was 3.4. The second one was .2.

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1 June 13th -- or June 21st, 2013, again, my name,
2 gather and analyze documents responsive to SEC requests.

3 Q Wait. I'll stop you there so we don't have to go
4 through all of them.

5 A Okay.

6 Q But who is Tenley? I do not to butcher the last name.
7 Is it --

8 A Mochizuki.

9 Q Mochizuki, okay. Tenley Mochizuki, who is that?

10 A She's an associate at Katten who worked with me on this
11 matter.

12 Q Okay.

13 All right. And I'm showing you Bates Stamp 49130,
14 and as you see so on July 30, 2013, it appears at the bottom
15 of the page, it says Prepare for and attend meeting with SEC
16 and attorney?

17 MR. DUBIN: Now I know I'm not doing that very
18 well.

19 THE COURTROOM DEPUTY: Mr. Carter is.

20 MR. DUBIN: Okay.

21 Q All right. So do you recall one way or the another
22 whether that was your first meeting with the SEC?

23 A I don't remember if it was the first meeting or not.

24 Q Evan Greebel was not at that meeting, correct?

25 A He was at -- he was never at a meeting with the SEC.

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1 Q Okay.

2 All right. Now, when you met with SEC, did they
3 inform you about what the scope of their investigation was
4 with entity?

5 A Yes.

6 Q And what was your understanding of what the scope of to
7 invest investigation was?

8 A It was of MSMB Capital.

9 Q All right. Do you recall when the first time
10 Mr. Shkreli testified before the SEC was?

11 A It was, I believe, in August of 2013.

12 Q Okay. And did you meet with Mr. Shkreli before he
13 testified?

14 A Yes.

15 Q Did you review with him the subject matter that you
16 felt he would be asked about?

17 A Yes.

18 Q Did he answer those questions to your satisfaction?

19 MS. SMITH: Objection to leading, Your Honor.

20 THE COURT: Rephrase.

21 Q Did he answer the questions that you asked him?

22 A Yes, it wasn't just me asking a question and him
23 answering. But, yes, it was a discussion between us.

24 Q Okay. What else happened at those meetings, without
25 telling you us any advice you gave to him or anything he

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1 said to you, just generally?

2 A Generally, we went through documents that were relevant
3 to their investigation. I spoke to him about questions I
4 thought that would come up. I also asked him questions
5 about the topics that would come up for my own information,
6 made sure I knew everything about what had happened.

7 Q Okay. Now, after Mr. Shkreli testified before the SEC,
8 did you discuss that testimony with Mr. Greebel?

9 A Yes.

10 Q Okay. Did you go over -- well, tell the jury about
11 what you told Mr. Greebel.

12 MS. SMITH: Objection to hearsay, Your Honor.

13 THE COURT: Sustained.

14 Q Were the conversations general or specific?

15 A General.

16 Q After Mr. Shkreli testified before the SEC, what do you
17 recall happening next?

18 A They had follow-up document requests; *subpoenas*, some
19 of which were based on the testimony, some of which were
20 not. They also asked that Mr. Shkreli come back for more
21 testimony.

22 Q Okay. And did you prepare -- well, what did you do in
23 response to that *subpoena*?

24 A Like before, I went over the *subpoena* with Mr. Shkreli.
25 I asked him to retrieve responsive documents. I also spoke

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1 to Marek Biestek about getting responsive documents.

2 Q Okay. And, Mr. Greebel, was he involved in either
3 collecting or reviewing the documents responsive to that?

4 A No.

5 Q Okay. And let me show you what I will mark as DX 1218
6 under Tab 7 in your binder for identification.

7 A Okay.

8 Q This is an e-mail to you, sir, from Mr. Schmidt in
9 summer of 2013, August 12th of 2013, correct?

10 A Correct.

11 Q And it says --

12 MR. DUBIN: Well, I will move DX 1218 into
13 evidence.

14 MS. SMITH: No objection, Your Honor.

15 THE COURT: All right. We admit Defense
16 Exhibit 1218.

17 (Defendant's Exhibit Number 1218 so marked and
18 received in evidence.)

19 BY MR. DUBIN:

20 Q So tell us what you recall about what was going on in
21 this request. What were you requesting?

22 A So this was the *subpoena* that followed his testimony
23 based on what I believe to be the subject of concern that
24 the SEC had during that testimony.

25 Q And what was your understanding of the area of

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1 concern?

2 A Initially they were asking questions about that trade,
3 the Orex trade. But it became clear during the testimony
4 they were very focused on what he was communicating to
5 investors when he lost money during that trade.

6 Q Okay. Now, did there come a time when you suggested to
7 the SEC that they speak to certain investors?

8 MS. SMITH: Objection to leading, Your Honor.

9 THE COURT: Well, it is leading, but I am going to
10 give you some latitude just on this question. But please,
11 again --

12 MR. DUBIN: Understood, Your Honor.

13 THE COURT: -- no leading questions.

14 MR. DUBIN: Understood Your Honor. I apologize.

15 THE COURT: All right. If we can just move this
16 along.

17 MR. DUBIN: I got it.

18 MS. SMITH: Also objection to the question to the
19 extent that it calls for hearsay.

20 THE COURT: All right.

21 BY MR. DUBIN:

22 Q Let me show you what I will mark as DX 8255 for
23 identification. It's under Tab 8 of your binder.

24 A All right.

25 Q Okay. And this is a letter that you sent to the SEC in

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1 September of 2013, correct?

2 A Correct.

3 Q Okay.

4 MR. DUBIN: I move DX 8255 into evidence.

5 MS. SMITH: Objection to hearsay, Your Honor.

6 MR. DUBIN: He wrote the document, Your Honor.

7 THE COURT: It is technically hearsay.

8 MR. DUBIN: I'm sorry?

9 THE COURT: It is technically hearsay.

10 MR. DUBIN: This goes directly to --

11 THE COURT: Can we do a sidebar if you want to

12 make a --

13 MR. DUBIN: Sure, Your Honor.

14 (Continued on next page.)

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Sidebar Conference

8642

1 (The following occurred at sidebar.)

2 MR. DUBIN: May I proceed?

3 THE COURT: Yes.

4 MR. DUBIN: Your Honor, this is a document that I
5 am not offering it for the truth. I am happy for Your Honor
6 to give an instruction. This is to show that he transmitted
7 communication to a government agency. I am not offering it
8 for the truth in any manner asserted in this document.

9 THE COURT: I'm just trying to figure out how it
10 goes to any issue that's relevant to this case in terms of,
11 you know, it's certainly not affect on Mr. Greebel or to
12 establish that Mr. Greebel was aware of it or anything like
13 that.

14 MS. SMITH: So no --

15 THE COURT: I'm not sure --

16 MS. SMITH: And if this is a question you have to
17 ask him about, but the document itself which is -- and they
18 are in a sense offering it for the truth of what was said in
19 the document.

20 MR. BRODSKY: Your Honor, we are not offering it
21 for the truth of whether or not the statements made, you
22 know, are accurate relating to the documents or the
23 information provided. We're offering it to show there's
24 been some -- there's an allegation in this case that
25 Mr. Greebel was concealing or hiding the investigation --

Sidebar Conference

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1 SEC investigation from the board. The Government -- I
2 believe that's the Government's allegation. One of the
3 allegations is that Mr. Richardson goes in and speaks to --
4 as you may remember, speaks to SEC in March.

5 What is significant to us is that there is a
6 transmittal from Katten to Mr. Rosensaft to the SEC.
7 Whether or not it's true or not, saying you can speak with
8 Mr. Richardson or Mr. Blanton, it is the opposite of what
9 you would do if you were concealing an investigation from
10 the SEC -- from the board. If you were in a conspiracy
11 to -- Mr. Greebel in a conspiracy to conceal an
12 investigation from the board of directors, the last thing
13 you would ever do is allow or enable a recommendation to go
14 forward to the SEC that the SEC actually speak with the
15 board of directors.

16 THE COURT: But they're being proffered as
17 investors not as board members, are they not, or are they --
18 I didn't get to look at that.

19 MS. SMITH: Sure.

20 THE COURT: I'm sorry.

21 MR. BRODSKY: I believe that's correct,
22 Your Honor. But if you're trying to hide an SEC
23 investigation from Retrophin, which is the Government's
24 allegation, you do not recommend to the SEC that they go
25 talk to the SEC, the board -- the Retrophin board members.

Sidebar Conference

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1 And so the purpose for this is for the transmittal of -- we
2 ask you -- you know, we invite you to go speak with
3 Mr. Richardson because that conveys to us an intent or a
4 reflects an intent inconsistent with the Government's theory
5 of prosecution.

6 THE COURT: But I'm wondering what Mr. Greebel has
7 to do with this letter and the response by Mr. Rosensaft,
8 because he's testified repeatedly that Mr. Greebel wasn't in
9 on the conversations. He wasn't in on the responses to the
10 SEC. He didn't sit in on any meetings. He had no role.

11 MR. BRODSKY: True.

12 THE COURT: He didn't check with Mr. Greebel
13 before he responded, so I just don't see how that
14 establishes anything that we want to establish.

15 MR. BRODSKY: Here's why, Your Honor. It is one
16 fact, it is not the only fact, but it is one fact among
17 many, that help us establish Mr. Greebel's intent. So we
18 would like to show the jury that there are multiple facts
19 that reflect that he didn't try to control the
20 investigation. That's one good fact for us.

21 Another good fact is that the person who was
22 handling the investigation is telling the SEC staff, along
23 with Mr. Shkreli, because Mr. Shkreli is the one who is
24 giving this information to Mr. Rosensaft, Go talk to
25 Mr. Richardson. And so we believe it's reflective not in an

Sidebar Conference

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1 attempt to conceal an investigation from Retrophin's board.
2 But rather reflect the opposite. It's just another fact
3 inconsistent with the Government's theory of hiding an SEC
4 investigation from Retrophin.

5 They're going to make much, Your Honor, of the
6 fact that Mr. Greebel had in their case in chief delayed
7 sending a bill out relating to the representation of MSMB in
8 connection with the SEC investigation, and they put in the
9 September 30, 2014 letter from Mr. Greebel to Mr. Shkreli's
10 personal e-mail address forwarding the bill. So we believe
11 to counter that and provide full information one significant
12 factor is Mr. Greebel never interfered and never stopped and
13 never suggested, Don't recommend Mr. Richardson -- the SEC
14 talk to Mr. Richardson.

15 THE COURT: Well, if he presumably didn't know
16 about it, he wouldn't have stopped it, right?

17 What you've established thus far is that this
18 witness did not consult with or confer with Mr. Greebel
19 about his responses to the SEC. I just think that this
20 is --

21 MR. BRODSKY: I can make one more attempt,
22 Your Honor --

23 THE COURT: Okay.

24 MR. BRODSKY: -- which is that the conspiracy
25 between Mr. Greebel and Mr. Shkreli --

Sidebar Conference

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1 THE COURT: And others.

2 MR. BRODSKY: -- and so -- and others, and so we
3 can show --

4 THE COURT: He's not a co-conspirator.

5 MR. BRODSKY: No, absolutely not. No,
6 Mr. Rosensaft in no way, shape, or form is a co-conspirator.
7 There's zero evidence Mr. Rosensaft has done anything wrong.
8 All evidence shows Mr. Rosensaft has done everything right.

9 And so, Your Honor, the fact that Mr. Shkreli
10 is directed -- pursuant to the directing -- directing
11 Mr. Rosensaft to recommend Mr. Richardson, it undercuts
12 the Government's argument that Mr. Shkreli was trying to
13 keep the SEC investigation from the board of directors. It
14 makes it more reasonable for Mr. Greebel and Mr. Rosensaft
15 for people to believe that Mr. Shkreli is not trying to hide
16 the SEC investigation from the board of directors.

17 And this becomes relevant, Your Honor, in 2014
18 when Mr. Greebel is -- Mr. Rosensaft is lied to, as well as
19 Mr. Greebel, although it hasn't come out, with respect to
20 what Mr. Shkreli's informing the board with intent to the
21 SEC investigation. So that's why it's important.

22 MR. DUBIN: May I just point something out to
23 Brodsky real quick?

24 MS. SMITH: Your Honor, it's hearsay. Again, it
25 can't be offered for the effective listener. I haven't

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1 heard an actual hearsay exception. By looking at this
2 document --

3 MR. PITLUCK: And it's clearly offered for the
4 truth of the matter asserted, which is what's written,
5 Judge, rather than proffering everything to 20 minutes.

6 THE COURT: Yes.

7 MR. DUBIN: Okay. I'll just ask him a question
8 about whether he informed the SEC that they could speak to
9 anyone.

10 MS. SMITH: That's hearsay, Your Honor.

11 THE COURT: So you're asking him to testify about
12 an out of court statement that he made? That is hearsay.

13 MR. DUBIN: Well, I'm going to say, Did you ever
14 encourage the SEC that they -- to interview investors in
15 Retrophin or in MSMB?

16 THE COURT: You know, that is kind of in the
17 background of Mr. Richardson who said, I was asked by
18 Mr. Shkreli to testify before the SEC. I did testify. I
19 did it in my capacity as an investor. I think it's in the
20 record. I don't think we need to put more hearsay into the
21 record.

22 MR. BRODSKY: Two points about that: That came
23 from Mr. Richardson's testimony. It's significant that it
24 comes from Katten for recommendation.

25 Second, Your Honor, the question is not -- is not

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1 hearsay, and so if we can elicit to Mr. Rosensaft, ask the
2 SEC, Would you consider interviewing Mr. Richardson or
3 Mr. Blanton or others? That's a question --

4 THE COURT: I think there's a way to ask that
5 wouldn't be leading and wouldn't necessarily be hearsay.

6 MR. BRODSKY: Do you have a suggestion?

7 MR. PITLUCK: You can't rephrase a statement into
8 a question to make it not hearsay. This is a statement.

9 THE COURT: It would have to be what, if anything,
10 did Mr. Rosensaft -- what steps did he take in response to
11 this.

12 MR. PITLUCK: But that's communicating hearsay,
13 Judge.

14 THE COURT: No.

15 MR. PITLUCK: That's elicited hearsay. He didn't
16 ask -- this is the statement. This is what he told them.

17 MR. BRODSKY: It does go, Your Honor, to
18 Mr. Shkreli's state of mind. That is relevant because of
19 the conspiracy. So if they're going to allege a conspiracy
20 between Mr. Shkreli and Mr. Greebel, and we can show
21 Mr. Shkreli's state of mind, it's not to hide the
22 investigation from the board, then that -- that is important
23 defense for us. So I think we should be allowed to ask
24 Mr. Rosensaft, elicit evidence that countervails the
25 Government's dealing with Mr. Shkreli's state of mind with

Sidebar Conference

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1 respect to the SEC investigation, and that is that
2 Mr. Shkreli knew about what writer were being transmitted
3 and what information was being transmitted to the SEC, and
4 that Mr. Shkreli wanted Mr. Rosensaft to ask the SEC to
5 interview Mr. Richardson. And I understand it's in the
6 record already through Mr. Richardson's testimony. The
7 Government has elicited that, so I don't know why they're --
8 they elicited it on their case and we cannot elicit it in
9 our case, very similar evidence, but now comes --

10 THE COURT: Well, they elicited through live
11 testimony of the witness about his act of testifying before
12 the SEC. You know, if you are trying to seek out-of-court
13 statements, it's hearsay.

14 MS. SMITH: Yes. And the state of mind of 8033,
15 for the declarant's state of mind, the declarant is
16 Mr. Richardson.

17 MR. DUBIN: Let me try to do it another way so
18 that I'm not going to --

19 MR. PITLUCK: Judge, we have now had five
20 proffers.

21 MR. DUBIN: I'm going to think about it on my way
22 from here to the podium, and I promise, Your Honor, that I
23 will for once get the form right.

24 THE COURT: Okay. But don't do it --

25 MR. DUBIN: I won't do it in the end.

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1 THE COURT: There's going to be an objection
2 to hearsay.

3 MR. PITLUCK: We don't want to come back to
4 sidebar.

5 MR. DUBIN: Your Honor, but in cross mode.

6 THE COURT: No, I know. The Government's lawyer
7 are usually not crossing and you are not directing.

8 MR. PITLUCK: We didn't get a lot of latitude on
9 leading, Judge.

10 THE COURT: I know you didn't. Sometimes just I
11 just -- you know, it's just more expedient.

12 I will try to -- I am trying very hard to treat
13 both sides equally, but do not solicit hearsay.

14 MR. DUBIN: I won't. Okay. Thank you.

15 THE COURT: Thank you.

16 (Continued on next page.)
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1 (Sidebar ends; in open court.)

2 BY MR. DUBIN:

3 Q Mr. Rosensaft, did you make witnesses available to the
4 SEC?

5 A I wouldn't characterize it as making witnesses
6 available.

7 Q Okay. How would you characterize it?

8 A I told the SEC --

9 MS. SMITH: Objection.

10 THE COURT: Sustained.

11 Q If you can do it in a way that is not hearsay.

12 MS. SMITH: Objection to the question.

13 THE COURT: Good thing he's a lawyer and
14 understands the law.

15 MR. DUBIN: I understand.

16 A I cannot answer that question without talking about my
17 communication with the SEC.

18 Q Okay. Do you know who Steven Richardson is?

19 A Yes.

20 Q Okay. Who is he?

21 A I believe he was the president at Retrophin and also an
22 investor in the MSMB Capital.

23 Q Okay. And what was your -- well, let me think this
24 through --

25 A I should say -- he was definitely a board member of

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1 Retrophin. I believe he was an officer. I'm not sure about
2 president, though. I'm not sure whether he was the
3 president or not.

4 Q The president of what?

5 A Of Retrophin.

6 Q Okay.

7 All right. Do you recall whether or not you made
8 Mr. Richardson available to the SEC to testify?

9 MS. SMITH: Objection, Your Honor.

10 THE COURT: Overruled.

11 A Again, I wouldn't characterize anything I did as making
12 him available.

13 Q Okay. Can you take a look at for identification at
14 DX 8255 in front of you?

15 A Yes.

16 Q And look at the second page. And that -- and the
17 second to last paragraph that begins "if," and just read
18 that paragraph to yourself.

19 A Okay.

20 Q Okay. Does that refresh your recollection that you
21 encouraged in one way or another that the SEC speak to
22 Mr. Richardson?

23 MS. SMITH: Objection, Your Honor.

24 THE COURT: Overruled.

25 A That I remember that I did tell the SEC that.

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1 MS. SMITH: Objection.

2 A That was -- I'm sorry.

3 MR. DUBIN: Could you read the question back? I'm
4 sorry.

5 MS. SMITH: We move to strike that.

6 THE COURT: Yes, it's stricken.

7 MR. DUBIN: Could we read the question back,
8 please?

9 THE COURT: Yes, you may have the question read
10 back.

11 (Requested portion read back.)

12 THE COURT: The question and answer are stricken.

13 MR. DUBIN: Well, I thought that Your Honor
14 overruled the objection to that? That was why I had him
15 read it back.

16 THE COURT: Oh, I'm sorry. Okay.

17 Yes, I struck the statement that the witness made
18 that would be hearsay. Sorry.

19 MR. DUBIN: No problem. You never have to
20 apologize to me, Your Honor.

21 Q You can answer the question.

22 A Well, your question was, Does it refresh my
23 recollection? The answer to that is, I have a clear memory
24 of that. I don't need my recollection refreshed.

25 Q Okay. And did you ask the SEC if they would speak to

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1 anyone?

2 A I suggested that they do.

3 Q Okay. And who?

4 A Mr. Richardson and Mr. Blanton.

5 Q Okay. Now, I want to -- to your knowledge, did anyone
6 at Katten contact MSMB investors to talk with them about the
7 SEC investigation, other than you?

8 A Not at Katten, no.

9 Q Okay. And did you communicate at all with the MSMB
10 investors relating to the SEC investigation?

11 A No.

12 Q Never?

13 A Never.

14 Q Okay. And let me show you -- take a look at Tab 28,
15 what I will mark for identification as DX 10435 on the
16 bottom.

17 A Okay.

18 Q If you could, read the bottom e-mail to yourself?

19 A I reviewed it.

20 Q Okay. Does that refresh your recollection that you, in
21 fact, were contacted by an investor?

22 MS. SMITH: Objection to the characterization.

23 THE COURT: Sustained.

24 Q Okay. Were you aware that any investors contacted
25 Martin Shkreli?

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1 A Yes.

2 Q And what was your understanding of what they contacted
3 Mr. Shkreli about? And just to be clear and narrow it,
4 regarding the SEC investigation?

5 MS. SMITH: Objection to hearsay, Your Honor.

6 THE COURT: What was your understanding of what
7 the investors contacted Mr. Shkreli about?

8 MR. DUBIN: Yes, just the subject matter.

9 THE COURT: I will allow the question.

10 A I was aware that investors had contacted Mr. Shkreli
11 about the SEC investigation.

12 Q And did Mr. Shkreli encourage them one way or another,
13 or do you know what Mr. Shkreli -- well, strike that.

14 Did Mr. Shkreli, to your knowledge, encourage them
15 to speak to the SEC?

16 MS. SMITH: Objection to hearsay, Your Honor.

17 THE COURT: Sustained.

18 Q Well, what is your understanding of whether or not the
19 investors were encouraged by anyone one way or another to
20 speak to the SEC?

21 MS. SMITH: Objection, Your Honor.

22 THE COURT: Sustained.

23 Q Were the investors encouraged by you or anyone else as
24 far as you know to communicate with the SEC?

25 MS. SMITH: Objection, Your Honor.

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1 THE COURT: Sustained.

2 Q Do you know of anything that was done to prevent
3 investors from talking to the SEC?

4 A No.

5 Q Are you aware that there was a willingness amongst the
6 management, including Martin Shkreli, to allow or encourage
7 investors to speak to the SEC?

8 MS. SMITH: Objection, Your Honor.

9 THE COURT: Sustained.

10 Q Did you ever discourage Martin Shkreli or anyone else
11 or any of the investors, for that matter, from speaking to
12 the SEC?

13 A No.

14 Q Are you aware of anyone at MSMB, Retrophin, or
15 anywhere -- or any other entity that Martin Shkreli was
16 involved in, that discouraged investors from speaking to the
17 SEC?

18 MS. SMITH: Objection. Asked and answered.

19 THE COURT: Sustained.

20 Q Now, based on your experience as -- well, let me ask
21 you this: Did you ever communicate with the SEC staff --
22 without tell telling me the substance -- did you ever
23 communicate with the SEC staff about contacting MSMB
24 investors?

25 A Yes.

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1 Q Okay. Why?

2 A Without getting into what people told me, because I
3 believe that if the SEC contacted those investors, it would
4 help their investigation and be favorable to my client.

5 Q Okay. And why did you think it would be favorable?

6 A Based on what Mr. Shkreli told me.

7 Q So based on all of your prior experience, both your
8 work as a prosecutor and your work at Cleary, how did you
9 view at this point in time the SEC's position regarding
10 their investigation?

11 MS. SMITH: Objection, Your Honor.

12 THE COURT: Sustained.

13 Q Okay. What was your view -- well, did you have a view
14 about the SEC's position at this point in time?

15 MS. SMITH: Objection to what point the time?

16 MR. DUBIN: I'm sorry. I didn't hear her.

17 THE COURT: She wants to know what point in time
18 you're referring to?

19 MR. DUBIN: Okay.

20 Q After -- let's see where I was -- in March of 2014?

21 A Yes.

22 Q Okay. What use your perspective on it?

23 MS. SMITH: Objection to form.

24 THE COURT: Would you rephrase your question,
25 please.

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1 BY MR. DUBIN:

2 Q All right. In 2013 did you have a view, all of 2013,
3 about the SEC's position regarding their investigation?

4 MS. SMITH: Objection, Your Honor, to what the
5 SEC's position was.

6 MR. DUBIN: I'm asking for his point of view.

7 THE COURT: You're asking what his view is about
8 the SEC's position regarding their investigation?

9 MR. DUBIN: Correct.

10 THE COURT: Do you want to just rephrase the
11 question.

12 BY MR. DUBIN:

13 Q What was your understanding of the SEC's position in
14 2013 regarding that investigation, your understanding?

15 A It evolved throughout that year.

16 Q Okay. And tell me about the evolution.

17 A At the beginning my hope was that it could be resolved
18 without any action taken by the SEC. As the year went on
19 and into 2014, it became clear to me that it was going to
20 involve some kind of an agreement with the SEC, most likely
21 a money judgment of some sort.

22 Q Okay. And just so we're clear, is that -- a money
23 judgment, is that a civil penalty or a criminal penalty?

24 A Civil.

25 Q Now, what happened next, as far as you recall?

Rosensaft - Direct - Durbin

8659

1 A In 2014?

2 Q Did you get another *subpoena* at some point?

3 A I don't remember exactly when I received all the
4 *subpoenas*, but there were regular *subpoenas* through this
5 period.

6 Q Okay. Take a look at Tab 9 in your binder.

7 A (Witness complies.)

8 Q Okay. I might have -- I think I can -- I'm in
9 September of 2013 now, okay?

10 A Okay.

11 Q September of 2013.

12 This is an e-mail that you received from Eric
13 Schmidt, correct?

14 A Correct.

15 Q September 26, 2013, right?

16 A Correct.

17 MR. DUBIN: I move DX 1212 into evidence,
18 Your Honor.

19 MS. SMITH: No objection, Your Honor.

20 THE COURT: All right. We will receive in
21 evidence Defense Exhibit 1212.

22 (Defendant's Exhibit Number 1212 so marked and
23 received in evidence.)

24 Q Can you explain to the Ladies and Gentlemen of the
25 Jury, Mr. Rosensaft, what this *subpoena* was about?

Rosensaft - Direct - Durbin

8660

1 A The SEC was asking for additional documents about
2 payment of management fees to the MSMB advisors, what they
3 call them.

4 Q Okay. And did there come a time that the SEC sent a
5 *subpoena* to Retrophin?

6 A Yes.

7 Q Okay. And approximately when was that?

8 A It was either the end of the 2013 or the beginning of
9 2014.

10 Q Okay. And prior to the SEC -- well, prior to sending
11 the *subpoena*, did the SEC ask you if it was okay to
12 represent Retrophin?

13 A I don't know if it was okay. They asked me if I was
14 representing Retrophin as well.

15 Q Okay. And did they ask you if you could accept service
16 of the *subpoena* for Retrophin as well as MSMB -- well,
17 strike that.

18 You had already accepted service for MSMB's
19 *subpoena*, right?

20 A Correct.

21 Q And did they ask you at some point if you could also
22 receive service for Retrophin's *subpoena*?

23 A Yes.

24 Q Okay. And what happened next?

25 A I told them that I could.

Rosensaft - Direct - Durbin

8661

1 MS. SMITH: Objection. Leading.

2 THE COURT: Sustained.

3 Q Did you --

4 A I --

5 Q Did you, in fact, accept service on behalf of

6 Retrophin?

7 A Yes.

8 Q And without telling me the substance, did you ask

9 Mr. Shkreli if it was okay for you to accept service on
10 behalf of Retrophin?

11 A Yes.

12 Q Okay. And did it present any issue for you to accept
13 service on behalf of Retrophin?

14 A At that point I saw no conflict, if that's what you're
15 asking me.

16 Q Okay. Why not?

17 A Well, we were already representing Retrophin for
18 initial matters. And I saw no -- I saw a common interest in
19 responding to the *subpoenas* directed to Retrophin and also
20 my work for MSMB.

21 Q Okay. And in September of 2013, Mr. Rosensaft, what
22 was your understanding of what the focus of the
23 investigation was, MSMB or Retrophin?

24 A MSMB.

25 Q Okay. And I want to show you what I will mark for

Rosensaft - Direct - Durbin

8662

1 identification as DX 1216. It's Tab 11 in your binder. Is
2 this another e-mail that you got from Mr. Schmidt of the
3 SEC?

4 A Yes.

5 Q Okay. And what is attached?

6 A Two subpoenas.

7 Q Okay.

8 MR. DUBIN: I move DX 1216 into evidence,
9 Your Honor.

10 MS. SMITH: No objection, Your Honor.

11 THE COURT: We will receive in evidence
12 Defendant's Exhibit 1216.

13 (Defendant's Exhibit Number 1216 so marked and
14 received in evidence.)

15 BY MR. DUBIN:

16 Q Okay. Now at this point in time, did you view the
17 investigation as being an investigation into Retrophin?

18 A No.

19 Q Okay. Why not?

20 A The SEC didn't change the title of their investigation.
21 In addition, their requests about Retrophin all were
22 centered on how the MSMB investors became investors in
23 Retrophin, not on Retrophin exactly.

24 (Continued on the next page.)
25

Rosensaft - Direct/Mr. Dubin

8663

1 EXAMINATION BY

2 MR. DUBIN (Continuing.):

3 Q Okay. And if we go to the next page, just the title of
4 the subpoena, it still says there "In the matter of MSMB
5 Capital Management, LLC valuation."

6 Right?

7 A Correct.

8 Q All right.

9 Is that what you meant when you said it didn't
10 change the title of the investigation?

11 A Correct.

12 Q And do you recall --

13 Well, do you know what a litigation hold is or a
14 document hold is?

15 A Yes.

16 Q Can you explain briefly to the jury what that is from
17 your understanding?

18 A When there is litigation, or you receive a subpoena,
19 typically, you would sent to the company and talk to the
20 company about sending out a memo to everyone who might have
21 relevant documents to make sure they're not destroyed or
22 thrown away.

23 Q Do you recall one way or another whether you initiated a
24 litigation hold or a document hold to Retrophin?

25 A I believe I did.

Rosensaft - Direct/Mr. Dubin

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1 Q And why did you do that?

2 A To make sure that no documents were either destroyed or
3 thrown away inadvertently.

4 Q I want to shift the focus now and change subjects.

5 Do you recall being asked questions about a D and O
6 questionnaire at some point in time by Mr. Greebel?

7 A Yes.

8 Q I want to show you what I want to mark for identification
9 as DX-1178. It's at Tab 13 in your binder, sir.

10 And I'm going to direct your attention to Bates
11 Stamp ending 9154.

12 Do you see that, sir?

13 A Yes.

14 Q Do you recognize that document, sir? If you flip ahead
15 to Paragraph 7.6.1, it's on Page 9 of that document. The
16 document, if you flip to Page 9 of that questionnaire?

17 A The Bates Number?

18 Q 119962. I put it up on the screen if you want to see it.

19 Do you recognize that paragraph, sir?

20 A Yes.

21 Q Okay. And at some point --

22 Well, let me show you. At some point, were you
23 asked about by Mr. Greebel about how that question should be
24 answered in connection with Martin Shkreli?

25 MS. SMITH: Objection to timeframe and what

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8665

1 question.

2 MR. DUBIN: Well, you know what, I move -- I'll move
3 DX-1178 into evidence.

4 MS. SMITH: Your Honor, I believe this is already a
5 Government Exhibit.

6 MR. DUBIN: Okay.

7 MS. SMITH: I don't have the Government Exhibit
8 right now, but we don't have an objection to it.

9 THE COURT: We will admit DX-1178 with the
10 understanding that it may already be a Government Exhibit.

11 (Defendant's Exhibit Number DX-1178 was marked in
12 evidence as of this date.)

13 MS. SMITH: Can we just get the date of the document
14 for the record.

15 MR. DUBIN: Sure. The date of the document is
16 February 11, 2014.

17 EXAMINATION BY

18 MR. DUBIN:

19 (Continuing.)

20 Q And do you recall --

21 Can you read that question out loud for the jury,
22 please?

23 A "Have you been, or are you presently, the subject of any
24 investigation by the SEC, the Commodity Futures Trading
25 Commission, FINRA, or any other regulatory or self-regulatory

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1 organization that could result in the finding of a violation
2 of any federal or state securities or commodities laws?"

3 Q And are you familiar with this form generally?

4 A I'm not sure what you mean generally.

5 Q What a D and O questionnaire?

6 A I'm familiar with it, yes.

7 Q Can you explain to the ladies and gentlemen of the jury
8 what it is?

9 A Based on obligations that the company has, usually, in
10 public filings or other obligations, they have to get
11 information from their directors and officers so they can
12 respond to regulators in the right way.

13 Q Okay. And did there come a time when Mr. Greebel came to
14 you and asked you a question, sir, about how 7.6.1 should be
15 answered?

16 A Yes.

17 Q And what did you tell them?

18 A I told him that Mr. Shkreli was not the subject of the
19 SEC investigation, the specific subject was MSMB Capital.

20 Q So I'll ask you to turn to Tab 14 in your binder and show
21 you what I'll mark for identification as DX-944A?

22 A Do you mean DX-9644A?

23 Q Yes, thank you. DX-9644A.

24 And I direct your attention to the Bates Stamp
25 ending 832. And I put it up on your screen if you need to see

Rosensaft - Direct/Mr. Dubin

8667

1 it?

2 Is that the same question, sir?

3 A Yes.

4 MR. DUBIN: I would move DX-9644A into evidence.

5 MS. SMITH: No objection, your Honor.

6 THE COURT: We admit DX-9644A.

7 (Defendant's Exhibit Number DX-9644A was marked in
8 evidence as of this date.)

9 EXAMINATION BY

10 MR. DUBIN:

11 (Continuing.)

12 Q So this is --

13 I'm showing you the D and O questionnaire with the
14 check mark on it, do you see that? Or an X on it?

15 A Yes, I see that.

16 Q Now, based on your handling of the SEC investigation,
17 your advice, Mr. Rosensaft was that --

18 MS. SMITH: Objection to the leading, your Honor.

19 THE COURT: Yes, sustained.

20 Q What was your advice about how that should be answered?

21 THE COURT: To whom?

22 MR. DUBIN: To Mr. Greebel.

23 MS. SMITH: Asked and answered, your Honor.

24 THE COURT: Sustained.

25 Q Does this reflect the advice that you gave?

Rosensaft - Direct/Mr. Dubin

8668

1 Did you have any quarrel with it?

2 THE COURT: This being for the record?

3 MR. DUBIN: Yes, this being the way the question was
4 answered.

5 THE COURT: Defense Exhibit 9644A. And you're
6 pointing to.

7 MR. DUBIN: I'm pointing to where it says, "I am
8 not."

9 THE COURT: No, let's just point to the page,
10 please --

11 MR. DUBIN: I'm sorry.

12 THE COURT: -- of this exhibit so we have it for the
13 record.

14 MR. DUBIN: Bates Stamp ending 832. 168832,
15 Paragraph 7.6.1.

16 Q Do you see that?

17 A Yes.

18 Q I am not the subject of any investigation regarding
19 violations of any federal or state securities or commodities
20 laws.

21 Do you see that?

22 A Yes.

23 Q Was that consistent with the advice you gave?

24 A Yes.

25 Q Okay.

Rosensaft - Direct/Mr. Dubin

8669

1 Now, did there come a time when you became involved
2 with a posting on a website called Scribd?

3 A Yes.

4 Q What is Scribd as best you can understand it?

5 A It's a website on the Internet where people can freely
6 post documents, typically, well, I'll leave it at that.

7 Q Okay. Do you recall when this incident occurred?

8 A I believe it was very late December or very, very early
9 January, well, late December of 2013 or very early January of
10 2014.

11 Q Okay. And you recall what the incident was,
12 Mr. Rosensaft?

13 A Yes.

14 Q Please tell the ladies and gentlemen of the jury what
15 happened?

16 A There was a posting on Scribd of one of the subpoenas in
17 the MSMB investigation and it was a confidential investigation
18 at that time, and so, it caused us concern.

19 Q And what did you do in response to this?

20 A I spoke to my clients and then I also spoke to the
21 Securities and Exchange Commission. I drafted a letter to the
22 individual who we believe had posted it to his attorney, and I
23 also spoke to Scribd as well.

24 Q Okay. I'd like to show you what I'll mark for
25 identification as DX-9539 under Tab 15 of your binder.

Rosensaft - Direct/Mr. Dubin

8670

1 Do you see that, sir?

2 A Yes.

3 Q Is this an e-mail that you sent to an
4 mdanblock@hotmail.com on January 2, 2014, at 10:57 p.m.
5 Central Standard Time.

6 A The bottom e-mail in the chain is that, yes.

7 Q Then you forwarded it, or you copied Mr. Gordon, Michael
8 Gordon, he was your partner at Katten; correct?

9 A Correct.

10 Q Who else did you talk to?

11 MS. SMITH: Objection to the document not in
12 evidence.

13 THE COURT: I beg your pardon.

14 MS. SMITH: The document is not in evidence.

15 MR. DUBIN: I move it into evidence and we
16 apologize.

17 MS. SMITH: We object to hearsay.

18 THE COURT: Sustained.

19 MR. DUBIN: Could you take a look at the next page,
20 please, your Honor.

21 THE COURT: Sustained. It's based on hearsay.

22 Q Did there come a point in time when you wrote a letter
23 to -- who did you write a letter to?

24 A To Jackson Su's attorney.

25 Q Okay. And why did you do that?

Rosensaft - Direct/Mr. Dubin

8671

1 A Because we believed that Jackson Su was the one who
2 had --

3 MS. SMITH: Objection to the foundation for his
4 knowledge of what he was going to testify to.

5 Q Did you do some investigation to determine who may have
6 posted this SEC subpoena on Scribd?

7 A I spoke to Mr. Shkreli who had done an investigation.

8 Q Did you accept his representations?

9 A Yes.

10 Q And did you look at the results of his investigation
11 before you sent that letter after?

12 A Yes.

13 Q Okay. And were you satisfied that what he represented to
14 you was true?

15 A Yes.

16 Q Okay. And so, what did you do next?

17 A I contacted Mr. Jackson's lawyer about it.

18 Q Or Mr. Su's lawyer?

19 A I'm sorry, Mr. Su's lawyer.

20 Q Okay. And what was the --

21 Generally, what did you --

22 What did you contact him and communicate?

23 THE COURT: About?

24 Q About Mr. Su's posting, or the suspicion that he had
25 posted this SEC subpoena on Scribd?

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8672

1 MS. SMITH: Objection to the extent it calls for
2 hearsay.

3 THE COURT: Yes, if you can answer it without
4 testifying about hearsay you may do so, sir.

5 A Well, maybe I can answer. The purpose of me contacting
6 him was to alert him to something we believed his client had
7 done.

8 Q What did you believe his client did?

9 MS. SMITH: Objection to the extent that the
10 foundation is hearsay.

11 THE COURT: Overruled.

12 A Unauthorized, well, accessed Retrophin's computers in an
13 unauthorized manner, taken the subpoena, and then posted it on
14 Scribd.

15 Q And from your perspective, was that proper?

16 A No.

17 MS. SMITH: Objection, your Honor.

18 THE COURT: Overruled.

19 A No.

20 Q Why not?

21 A Because it's a crime for other reasons.

22 Q Is that the legal position you took when you contacted
23 Mr. Su and his lawyer?

24 A Yes.

25 Q Now, did you ever receive a response from Mr. Su or his

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1 lawyer?

2 A No.

3 Q Did that concern you?

4 A I don't know about concern. I wouldn't characterize it
5 as concern.

6 Q How would you characterize it?

7 A A lawyer being a lawyer.

8 Q All right. Did you contact, well, what did you do next?
9 Did you contact Scribd?

10 A Yes.

11 Q And what did you -- what were you -- what was the purpose
12 of your contacting Scribd?

13 A To try to get them to take down the posting.

14 Q Did they?

15 A Yes, ultimately.

16 Q Who else did you contact?

17 A Eric Schmidt at the Securities and Exchange Commission.

18 Q Okay. So let me, well, what was the purpose of
19 contacting Mr. Schmidt?

20 A To try to see if he could also contact Scribd in an
21 effort to get the posting down.

22 Q Mr. Rosensaft, could you tell the jury what the SEC did?

23 A They contacted Scribd and told them certain things.

24 Q What is your understanding of what the purpose of the
25 SEC's contacting Scribd was?

Rosensaft - Direct/Mr. Dubin

8674

1 A They conveyed a message that I asked them to convey to
2 Scribd about the subpoena.

3 Q Okay. What was your reaction to the SEC agreeing to
4 contact Scribd?

5 MS. SMITH: Objection.

6 THE COURT: Sustained.

7 Q Did you have a reaction --

8 MS. SMITH: Objection.

9 Q -- it the SEC agreeing to contact Scribd?

10 THE COURT: Sustained. Did I mistake --

11 MS. SMITH: Objection, your Honor.

12 THE COURT: Okay.

13 Q Did you ever consider, Mr. Rosensaft, bringing the matter
14 of Mr. Su, of what Mr. Su did to the federal authorities?

15 A Not report it to the police if that's what you mean. We
16 did not do that.

17 Q No. I said, Did you ever consider that?

18 A Yes.

19 Q And why didn't you do that ultimately?

20 A The initial thing we were concerned about is getting the
21 subpoena down as quickly as possible. When it actually came
22 down, there was also litigation going on with Mr. Su and we
23 decided it's best left to that litigation.

24 Q Was your objective in your mind satisfied once it was
25 taken down?

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1 A My objective, yes.

2 Q Okay?

3 A Although there would be further litigation as well.

4 Q Got it. Now, in late --

5 THE COURT: May I just ask one question? When you
6 use the term "we decided," or "we thought," who is we besides
7 you?

8 THE WITNESS: Myself, Mr. Greebel, and Mr. Shkreli.

9 Q And Mr. Rosensaft, I want to focus your attention on late
10 January 2014, okay?

11 A Okay.

12 Q What happened next in connection with the SEC
13 investigation?

14 A They asked for Mr. Shkreli to testify again, and they
15 generally continued sending requests for documents.

16 Q Okay. And did they communicate anything to you about
17 what the topics of the testimony was going to be, or the topic
18 of the questions they were asking going to ask Mr. Shkreli
19 would be?

20 A Generally, yes.

21 Q Okay. And what was your understanding of what the topics
22 would be related to MSMB or Retrophin?

23 A MSMB. And also how the MSMB investors became investors
24 in Retrophin.

25 Q Did Mr. Shkreli indeed testify again in February?

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1 A Yes.

2 Q Okay. Same question. Was it related to MSMB primarily?

3 A Yes. And again, how those investors became investors of
4 Retrophin.

5 Q Okay. What, if anything, did Mr. Shkreli tell the SEC
6 staff about payment of the Merrill Lynch settlement?

7 MS. SMITH: Objection to hearsay.

8 THE COURT: Sustained.

9 Q Did you come to learn at any point in time what
10 Mr. Shkreli -- how Mr. Shkreli paid the settlement of the
11 Merrill Lynch matter?

12 A Yes.

13 Q What was your understanding?

14 A That part of the money came from him personally, and part
15 of the money came from MSMB Healthcare which was another MSMB
16 entity.

17 Q And did you provide any advice to Martin Shkreli in
18 connection with his payment of the settlement of the Merrill
19 Lynch matter?

20 A Yes.

21 Q What generally was your position on that?

22 A My answer would necessitate telling me kind of how much
23 he characterized that payment from MSMB Healthcare.

24 Q Okay. Well, I don't want to do that.

25 Just generally speaking, did you give him advice on

Rosensaft - Direct/Mr. Dubin

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1 things that he should do next?

2 A Yes.

3 Q Okay. And without telling us the substance of what you
4 communicated, could you tell us what your position was on what
5 should be done?

6 A My position was that all of the money should have come
7 from Martin himself as opposed to MSMB Healthcare.

8 Q And did you encourage that advice at some point?

9 A I conveyed that advice.

10 Q And did you convey that advice to Evan Greebel at any
11 time?

12 A I informed Evan Greebel about what had happened.

13 Q Did he disagree with you in any way about the advice you
14 gave?

15 A No.

16 Q Okay. Now, in March of 2014, were more subpoenas sent by
17 the SEC?

18 A I can't be sure of the exact date, but the SEC continued
19 it send subpoenas.

20 Q And they continued to send subpoenas related to what?

21 A Again, their investigation of MSMB Capital.

22 Q And did -- for any of these subpoenas, did Evan Greebel
23 ever play a role in helping respond to those subpoenas or
24 reviewing documents in response to those subpoenas?

25 A He never reviewed documents and never prepared the

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1 response.

2 Q You were primarily in charge of that?

3 A Correct.

4 Q Okay. Now, did you ever get a copy of the transcript of
5 Mr. Shkreli's testimony before the SEC?

6 A No.

7 Q Okay. I just have a few more quick subjects.

8 Do you know who a gentleman by the name of Darren
9 Blanton is?

10 A Yes.

11 Q Who is Darren Blanton?

12 A He was an investor in MSMB Capital, and also later he had
13 a role at Retrophin.

14 Q Did you have, or did you gain, an understanding of what
15 his particular expertise --

16 A Yes.

17 Q -- or experience?

18 A Through what Mr. Shkreli told me.

19 Q I don't want to know that.

20 Did you come to learn that he had any expertise
21 based on any independent research that you did?

22 A No.

23 Q Did you accept the representations that Mr. Shkreli
24 communicated to you or made to you about Mr. Blanton as true?

25 A About his experience, yes.

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1 Q Did you have, in your course of dealing, and we're going
2 to get into them in a little bit of detail, was there anything
3 that you learned through your involvement with the Darren
4 Blanton issue that contradicted what Mr. Shkreli communicated
5 to you about his background or experience?

6 MS. SMITH: Objection to form.

7 THE COURT: I'll overrule it.

8 A No.

9 Q Now, did you come to learn anything about Mr. Blanton's
10 dispute with Mr. Shkreli?

11 A Yes.

12 Q Okay. And please tell the jury what you learned about
13 that?

14 A He was one of the investors in MSMB Capital who lost his
15 money because of Mr. Shkreli's trades.

16 Q Okay. And did you understand that Mr. Blanton took
17 the --

18 Well, what position did Mr. Blanton take?

19 A That Mr. Shkreli lost all his money and he wanted to be
20 repaid.

21 Q Okay. At some point, were you copied on some e-mail
22 communications regarding this matter?

23 A Yes.

24 Q I want to show you what I'll mark for identification as
25 DX-7917 and that's under Tab 20 in your binder.

Rosensaft - Direct/Mr. Dubin

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1 That's an e-mail from Martin Shkreli to Darren
2 Blanton, and it copies you and Mr. Greebel. I'm on the bottom
3 of that page. That's at August 10, 2013.

4 A Yes.

5 THE COURT: Mr. Dubin, I don't want interrupt you
6 inquiry on this exhibit. Otherwise, I would suggest perhaps a
7 midmorning juror break.

8 MR. DUBIN: I will never quarrel with a break.

9 THE COURT: All right.

10 Members of the jury, we'll give you your midmorning
11 break at this time.

12 Please don't talk about the case, and we will come
13 and retrieve you have when we're ready.

14 (Jury exits courtroom at 11:28 a.m.)

15 THE COURT: All right. Let's take a quick break.

16 Sir, you can step down width stand.

17 THE WITNESS: Thank you, your Honor.

18 MR. DUBIN: Ten minutes, your Honor.

19 THE COURT: Yes.

20 (A recess in the proceedings was taken.)

21 THE COURT: Mr. Brodsky, do you want to see if the
22 jurors would sit without lunch? I think I told them they can
23 take a shorter lunch, maybe half an hour. I just feel like
24 maybe they might be better about everything. Just everyone
25 feels better when they have a little food. We don't want any

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1 hangry jurors.

2 MR. BRODSKY: Yes, your Honor.

3 THE COURT: Is everyone back?

4 MS. SMITH: I think we're waiting. Sorry.

5 (Witness takes the witness stand.)

6 COURTROOM DEPUTY: All rise.

7 (Jury enters courtroom at 11:45 a.m.)

8 THE COURT: All jurors are present. Please have a
9 seat.

10 MR. DUBIN: May I proceed, your Honor?

11 THE COURT: Just let me check with the jurors about
12 the question regarding lunch.

13 Yesterday, I told you that I would dismiss you at
14 2:00 o'clock, and I'm wondering if we could indulge upon you
15 to either take a shorter lunch or an extra maybe little bit
16 longer break so that you're out between 20 and 30 minutes
17 would than acceptable to everybody.

18 THE JURY: (Collectively) Yes.

19 THE COURT: Give us the signal when you're hungry
20 and ready to take your 30-minute break. Thank you.

21 You may proceed.

22 MR. DUBIN: Thank you, your Honor.

23 EXAMINATION BY

24 MR. DUBIN: (Continuing.)

25 Q So I think when we left off, Mr. Rosensaft, I showed you

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1 DX-7917.

2 Do you have that in front of you behind Tab 20 of
3 your binder?

4 A I do.

5 Q Okay. And Martin Shkreli sent you, or copied you, on an
6 e-mail to Darren Blanton and also copied Mr. Greebel; correct?

7 A Yes.

8 Q And that's on August 10, 2013.

9 And then when Mr. Blanton responds on August 15th,
10 you're copied on that as well and remain copied through the
11 rest of the chain that ends at 9:08 in the morning on
12 August 15th; correct?

13 A Correct.

14 MR. DUBIN: I move DX-7917. Do you have that, your
15 Honor?

16 THE COURT: I beg your pardon.

17 MR. DUBIN: I would move DX-7917 into evidence.

18 MS. SMITH: Your Honor, no objection. I believe the
19 chain is in evidence already.

20 THE COURT: I believe so, too, but we'll admit it
21 anyway. DX-7917 is in evidence.

22 (Defendant's Exhibit DX-7917 was marked in evidence
23 as of this date.)

24 Q Do you recognize this e-mail chain?

25 A I do.

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1 Q And see that line in the middle, there you go, when
2 Martin Shkreli, at some point, says, "My lawyers are lazy and
3 stupid and paid too much. I send them important e-mails and
4 they don't respond. Guys, please use the same agreement we
5 used with AG."

6 Do you know who AG was, by the way?

7 A I believe it's his first name is Al, last name is Geller.

8 Q What did you know about that agreement?

9 MS. SMITH: Objection to the form of the question.

10 Q Did you know --

11 THE COURT: Sustained.

12 Q Did you know about that agreement?

13 MS. SMITH: Objection to the form of the question.

14 No agreement that's been asked.

15 THE COURT: Do you want to lay a foundation?

16 MR. DUBIN: Sure, your Honor.

17 Q Did you have an understanding that there was, one way or
18 another whether, whether there was an agreement with
19 Mr. Geller?

20 A Not that I remember before I saw this e-mail.

21 Q Okay. So when you saw this e-mail and it says, "Please
22 use the same agreement we used with AG."

23 One way or another, did you know what that meant?

24 A Only that Geller had an agreement previously.

25 Q Okay. And so, when Mr. Shkreli says, "My lawyers are

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1 lazy and stupid and paid too much," what was your reaction to
2 that?

3 A Frankly, I did not take it as being directed toward me
4 but directed toward Mr. Greebel.

5 Q Well, there is an "S" on the end of lawyers; right?

6 A I see that, but I was not involved in preparing those
7 agreements. So, again, I felt like I had a different
8 relationship with Mr. Shkreli than Mr. Greebel did.

9 Q Okay. Well, did you observe Mr. Shkreli?

10 Well, how did you observe Mr. Shkreli treat
11 Mr. Greebel?

12 A He treated him poorly, often insulting him.

13 Q And did Mr. Greebel, at all times, when he was insulted
14 by Mr. Shkreli, how did Mr. Greebel respond?

15 A He just shook it off.

16 Q Did he act professional?

17 A Yes.

18 Q As an attorney, are you required to take abuse from
19 clients?

20 MS. SMITH: Objection to the question.

21 THE COURT: Sustained.

22 Q Now, you see in the top of the e-mail chain where Martin
23 Shkreli responds, well, I just want to put it into context,
24 Mr. Carter.

25 So let's go down to the bottom e-mail. So there's

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1 an e-mail from Mr. Shkreli to Mr. Blanton copying you and
2 Mr. Greebel; correct?

3 A Correct.

4 Q He writes: "Hi, guys. Darren and I have an agreement
5 that I will give him a 100,000 shares of my stock. Please
6 effect the transaction and send him documents ASAP. Darren,
7 as you know, has been waiting extremely patiently to resolve
8 this matter and we are letting him down. There will be
9 further discussion on resolution, but this immediate transfer
10 should be begin this process. Thanks, Martin."

11 Right?

12 A Correct.

13 Q And then the next e-mail is from Mr. Blanton back to
14 Mr. Shkreli copying you and Mr. Greebel, and Mr. Blanton
15 writes, "Is there anything we need to be doing? Are we still
16 moving forward with this?"

17 Correct?

18 A Yes.

19 Q And than Martin Shkreli sends that response, correct,
20 that we just went through?

21 A Correct.

22 Q And then Mr. Greebel responds to him and you're not on
23 that e-mail; correct?

24 A That's right.

25 Q All right. And it says, "AG had a forward option. Is DB

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1 getting the same thing?"

2 Who did you understand DB to be?

3 A Darren Blanton.

4 Q And also I assume we want a release from him; right?

5 A Correct.

6 Q And Mr. Shkreli adds you back to the chain; right?

7 A That's right.

8 Q And he adds you back to the chain and says, "Yes. Also,
9 we want him to talk to SEC."

10 Do you see that?

11 A Yes.

12 Q What was your reaction when you read those words, "Also,
13 want him to talk to SEC"?

14 A It immediately set off alarm bells for me.

15 Q Why?

16 A Because there was an active SEC investigation where they
17 were considering whether the investors of MSMB Capital,
18 including Darren Blanton, was harmed. The SEC, we believe,
19 was likely speaking to investors, and I didn't want anyone
20 speaking to the investors about their testimony that they may
21 give to the SEC.

22 Q And without telling us the substance of what you said,
23 did you communicate those concerns at some point to
24 Mr. Shkreli?

25 A Yes.

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1 Q And was that on the phone or in person?

2 A That was on the phone.

3 Q And was Mr. Greebel on that call?

4 A I don't believe he was on that particular call.

5 Q Okay. But did you also ask Mr. Greebel to talk to
6 Mr. Shkreli about this?

7 A Yes.

8 THE COURT: This being?

9 MR. DUBIN: The advice.

10 THE COURT: About Mr. Blanton?

11 Q The advice regarding not speaking to the -- not requiring
12 them to speak to the SEC.

13 Do you follow my question?

14 A Yes. I spoke to Mr. Greebel about making sure Martin was
15 not talking to any investors about speaking to the SEC.

16 Q Mr. Rosensaft, did Mr. Greebel agree with your advice?

17 A He -- yes, he did.

18 Q And I want to show you what is already in evidence, I
19 believe, as GX116-40.

20 Yes, that's it.

21 Okay. You recall this e-mail exchange?

22 Just scroll down.

23 See the one I'm particularly focusing on? The one
24 in the middle there where, on December 28th at 2:08 a.m.,
25 where it says, "I basically want to discuss having the plain

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1 complainer, Darren Blanton, recant his complaint. I have to
2 give him some stock ASAP."

3 Do you see that?

4 A Yes.

5 Q And do you recall this?

6 A Yes.

7 Q And did you speak to Mr. Shkreli about this?

8 A I did.

9 Q Without going through -- what was your reaction to that,
10 and what advice did you --

11 What was your reaction to that?

12 A Again, it set off alarm bells for the same reason here.
13 I didn't want Mr. Shkreli talking to Mr. Blanton at all about
14 recanting his complaint for talking to the SEC in any
15 particular manner.

16 Q And you communicated your advice to Mr. Shkreli; correct?

17 A Correct.

18 Q And there came a time, just to move it along, where you
19 were involved in some of the settlement negotiations with
20 Mr. Blanton; right?

21 A Yes.

22 Q Okay. So let me show you Tab 22 in your binder and mark
23 it for identification as DX-1051.

24 A Okay.

25 Q Well, do you recall -- let me put the document aside.

Rosensaft - Direct/Mr. Dubin

8689

1 Do you recall ever being in contact with
2 Mr. Blanton's attorneys?

3 A Yes.

4 Q What was the attorney's name?

5 A I want to say his last name was -- I don't remember
6 specifically.

7 Q See if the document in front of you refreshes your
8 recollection?

9 A Yes, it does.

10 Q Okay. What was the attorney's name?

11 A J.D. McCullough.

12 Q Do you remember a call with J.D. McCullough?

13 A I do.

14 Q And what do you recall about the call?

15 MS. SMITH: The time period, please.

16 MR. DUBIN: Sure. This is the end of 2013.
17 December 30, 2013.

18 A Generally speaking, the call was to discuss the transfer
19 of stock and settling the dispute with Mr. Blanton.

20 Q And do you recall that there was some back and forth
21 about how many freely traded -- well, what do you recall the
22 back and forth being about in the discussion?

23 A One of the issues was whether Mr. Blanton was going to
24 receive restricted stock that he couldn't tell immediately or
25 freely traded stock that he could immediately turn into money.

Rosensaft - Direct/Mr. Dubin

8690

1 Q Okay. Why don't you turn to Tab 24 in your binder. Do
2 you recall what's been marked for identification as DX-9556.

3 Do you remember this e-mail exchange, sir?

4 A Not specifically.

5 Q This is an e-mail exchange between you, Martin Shkreli,
6 and Evan Greebel; correct?

7 A Correct.

8 Q And this is on January 3, 2014; correct?

9 A That's right.

10 MR. DUBIN: I move DX-9556 into evidence.

11 MS. SMITH: Objection, your Honor.

12 THE COURT: Sustained.

13 Q Did you have conversations, without telling us the
14 substance of the conversations, did you have conversations
15 about the settlement with both Mr. Greebel and Mr. Shkreli at
16 some point?

17 THE COURT: You mean the Mr. Blanton settlement?

18 MR. DUBIN: Yes I'm sorry.

19 Q And Mr. Blanton's settlement with Mr. Greebel and
20 Mr. Shkreli?

21 A Yes.

22 Q Okay. And what do you recall about Mr. Blanton?

23 A That he was one of the biggest investors in MSMB Capital.
24 He was angry at Martin for how Martin had handled
25 MSMB Capital, the investments. And I got the impression that

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8691

1 Mr. Shkreli and Mr. Blanton were close at least at one point.

2 Q And did there come a time that they came to an agreement?

3 A Yes.

4 Q All right. And are you familiar, sir, with Mr. Blanton's
5 consulting agreement?

6 MS. SMITH: Objection to the leading, your Honor.

7 THE COURT: Overruled.

8 A I saw an agreement that resolved a dispute between
9 Mr. Blanton and Mr. Shkreli.

10 Q What type of an agreement was it?

11 A It was a consulting agreement with a release for any
12 dispute that they had.

13 Q And did you have any reaction to it being a consulting
14 agreement?

15 A Yes.

16 Q Okay. And what was your reaction to it?

17 A That I wanted to ensure actually it was a consulting
18 agreement.

19 Q Okay. And did you communicate that to anyone?

20 A Yes.

21 Q It who?

22 A I communicated it to Mr. Greebel and to Mr. Gordon and
23 Mr. Shkreli.

24 Q So Mr. Gordon was aware of this agreement as well?

25 A Yes.

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8692

1 Q And when you communicated it to Mr. Shkreli, were you
2 satisfied that he understood your advice from your
3 perspective?

4 A Yes.

5 Q Did you get assurances that made you comfortable?

6 A Yes.

7 Q Okay. Now, did you ever review the Blanton consulting
8 agreement?

9 A I reviewed one of the agreements. I can't remember,
10 specifically, it was the Blanton one, but I believe it was the
11 Blanton one.

12 Q Okay. Let me see if I can skip ahead to my last subject.
13 Now, how did you bill your time for the Retrophin
14 matters?

15 A Initially, it was billed under a client matter number
16 four MSMB Capital. There was work later, though, I did for
17 Retrophin and that was billed under a Retrophin number.

18 Q Okay. And did Mr. Greebel ever ask you not to enter your
19 time on your bills?

20 MS. SMITH: Objection to the to leading.

21 THE COURT: I'll sustain the objection.

22 Q Did you ever have any conversations with Mr. Greebel or
23 receive any e-mails regarding how you should handle your
24 billing of those matters?

25 A Yes.

Rosensaft - Direct/Mr. Dubin

8693

1 Q And did Mr. Greebel ever ask you to do anything in terms
2 of entering your time or how you billed it you felt it was
3 improper?

4 A No.

5 Q Okay. Now, did there come a point in time when you
6 learned at some point that the bill for your time on the SEC
7 matter had not gone out?

8 A No. I believe it had gone out. It hadn't been paid.

9 Q It hadn't been paid. What was your reaction to that?

10 A I was surprised and annoyed that all that work hadn't
11 been paid for yet.

12 Q And have you ever had an instance where a client was
13 behind on payment of bills?

14 A Sure.

15 Q Okay. And what was your understanding of who would be
16 paying the bill?

17 A After that meeting or -- after that discussion I had or
18 before that discussion.

19 Q After the discussion you had when you, I think you said
20 annoyed, that the bill hadn't been paid?

21 MS. SMITH: Can we get a timeframe?

22 Q When do you recall this occurring?

23 A To my best recollection, I believe the spring of 2014.

24 Q Okay.

25 THE COURT: So can I just back up?

Rosensaft - Direct/Mr. Dubin

8694

1 You talked about a discussion in the spring of 2014.

2 THE WITNESS: Yes.

3 THE COURT: Who was that with?

4 THE WITNESS: That was with Mr. Greebel and
5 Mr. Shkreli.

6 THE COURT: Thank you.

7 Q Now, at some point, did you confront Mr. Shkreli about
8 the nonpayment of the bill?

9 MS. SMITH: Objection to leading.

10 THE COURT: Sustained.

11 Q What, if anything, did you do in an attempt to get the
12 bill paid?

13 A I spoke to Mr. Shkreli and Mr. Greebel about it.

14 Q And what, if anything, did you come to learn about the
15 delay and why it wasn't paid yet?

16 MS. SMITH: Objection to hearsay, your Honor.

17 THE COURT: Sustained. No hearsay. If you can
18 answer it without hearsay you can do so, sir.

19 THE WITNESS: I can't answer it without hearsay.

20 Q Well, did you come to learn at some point whether or not
21 there was an arrangement --

22 MR. DUBIN: Strike that.

23 Q Did you come to learn at some point that Mr. Shkreli was
24 making an attempt to get the bill paid?

25 A This was based on what was told too me, yes.

Rosensaft - Direct/Mr. Dubin

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1 Q All right. And were you satisfied that at least an
2 attempt was being made to get the bill paid?

3 A I was glad an attempt was being made. I still wasn't
4 satisfied that the bill wasn't getting paid.

5 Q Okay. And do you know one way or another whether or not
6 Mr. Shkreli had conversations with anybody either at Retrophin
7 or --

8 MR. DUBIN: Strike that.

9 Q Do you recall whether or not there -- learning that there
10 was an arrangement between Mr. Shkreli and any of his entities
11 in terms of who would be paying the bill?

12 A I do -- I did learn that.

13 Q Okay. And did it involve a public company?

14 A This is based on what Mr. Shkreli told me.

15 Q Don't tell me that then. I will just stick with your
16 answer to the prior question.

17 At some point, you learned that; correct?

18 A Yes.

19 Q Now, in all of your dealings with -- in giving advice to
20 Mr. Shkreli that Mr. Greebel had -- was involved with? Was
21 there ever a still instance when Mr. Greebel went against your
22 advice?

23 A No.

24 MS. SMITH: Objection to knowledge about what
25 Mr. Greebel did.

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1 THE COURT: Sustained.

2 MS. SMITH: The answer struck -- can we have the
3 answer struck?

4 THE COURT: The question and answer will be
5 stricken.

6 EXAMINATION BY

7 MR. DUBIN (Continuing.):

8 Q Well, did Mr. Greebel tell you all of the
9 conversations --

10 Did he report to you about every conversation he had
11 with Mr. Shkreli?

12 A No.

13 MR. DUBIN: One moment, your Honor.

14 (A brief pause in the proceedings was held.)

15 (Continued on the next page.)
16
17
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25

ROSENSAFT - DIRECT - DUBIN

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1 MR. DUBIN: I ask the Court and jury's indulgence.

2 (Short pause.)

3 BY MR. DUBIN:

4 Q Two quick things I would like to show you. I want to go
5 back to the Blanton consulting agreement, and it will be my
6 last subject. Can we show GX-61 in evidence. Can we go to
7 paragraph 8A.

8 MR. DUBIN: Would you highlight the last sentence,
9 Mr. Carter, please.

10 BY MR. DUBIN:

11 Q You recall that sentence in the Blanton consulting
12 agreement, sir?

13 A Yes.

14 Q Can you read it out loud, please.

15 A This section does not apply to any discussions that
16 consultant has been advised by counsel, is required by law, or
17 otherwise required pursuant to the United States securities
18 laws.

19 Q Who added that sentence to the consulting agreement?

20 A I believe I actually -- I didn't draft exact words, but I
21 was the one, I believe, that came up with that idea that that
22 should be added.

23 MR. DUBIN: Okay. Let me just confer, but I think I
24 have no further questions.

25 (Short pause.)

PROCEEDINGS

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1 MR. DUBIN: I have nothing further, Your Honor.

2 THE COURT: All right. Thank you.

3 Is the government prepared to cross?

4 MS. SMITH: Yes. Although, I know we're stopping at
5 2:00, and we're going to take a lunch break. If we take it
6 now, I might be actually able to cut down actually what we are
7 going to do for cross.

8 THE COURT: Okay. Would the jurors be able to come
9 back and be ready to recommence by 12:40? Thank you. Please
10 don't talk about the case or think about the case until we
11 come and retrieve you. Thank you.

12 (WHEREUPON, at 12:09 p.m., the jury exited the
13 courtroom.)

14 (Open court; no jury present.)

15 THE COURT: We'll take a half an hour. Is there
16 anything we need to deal with, or just take the half an hour?

17 MS. SMITH: Just take the half an hour.

18 THE COURT: Okay.

19 (WHEREUPON, a recess was had from 12:10 p.m. to
20 12:40 p.m.)

21 (Continued on the next page.)

22

23

24

25

Rosensaft - Cross - Smith

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1 A F T E R N O O N S E S S I O N

2 (Jury enters the courtroom at 12:46.)

3 (Jury present.)

4 (Witness resumes the witness stand.)

5 THE COURT: All jurors are present. Please have a
6 seat.

7 Mr. Rosensaft, you're still under oath. And
8 Ms. Smith, you may commence on your cross.

9 CROSS-EXAMINATION

10 BY MS. SMITH:

11 Q Good afternoon, Mr. Rosensaft.

12 A Good afternoon.

13 Q You testified on direct that you started work at Katten
14 as a partner in November of 2012; is that right?

15 A Yes.

16 Q And you were hired as a nonequity partner; is that
17 correct?

18 A That's correct.

19 Q And for the first two years and a half you were hired
20 you had a guaranteed fixed salary, right?

21 A That's correct.

22 Q And so for your first two years only, your salary was
23 not tied to any other factor?

24 A Correct.

25 Q And only after the first two years were up, was your

Rosensaft - Cross - Smith

8700

1 salary set by the compensation committee that evaluates the
2 compensation for nonequity partners, correct?

3 A That's right.

4 Q So turning your attention to when you started for
5 Katten in November of 2012, the first time that you worked
6 with the defendant, Mr. Greebel, was on matters related to
7 Mr. Shkreli, correct?

8 A Yes.

9 Q And you started to work together when the defendant
10 came to you and told you that he had a client that was
11 handling an SEC investigation on his own, right?

12 A That's correct.

13 Q And that client needed a lawyer to help handle the SEC
14 investigation?

15 A Correct.

16 Q And you later came to learn that the client was Martin
17 Shkreli, correct?

18 A Yes.

19 Q And the conversation with the defendant told you about
20 Mr. Shkreli handling the SEC investigation on his own, took
21 place relatively shortly after you started at Katten in
22 November of 2012?

23 A Yes. It was relatively shortly after he first
24 approached me to help with his client.

25 Q And so you would estimate that the first conversation

Rosensaft - Cross - Smith

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1 about helping with the client, Martin Shkreli, took place in
2 December of 2012 or January 2013?

3 A That's my memory.

4 Q And at the end of that conversation the defendant said
5 he would speak to Mr. Shkreli and get back to you; is that
6 right?

7 A Yes.

8 Q And shortly thereafter, he let you know that
9 Mr. Shkreli had agreed to have you handle the SEC
10 investigation, correct?

11 A Correct.

12 Q And after that took place, did you initially have a
13 phone call with Mr. Shkreli and Mr. Greebel?

14 A I believe we first did have a phone call and then an
15 in-person meeting shortly followed.

16 Q And where did that meeting take place?

17 A It was at the 3rd Avenue office of Retrophin and
18 MSMB Capital.

19 Q And at that meeting was yourself and Mr. Greebel and
20 Mr. Shkreli, correct?

21 A That's correct.

22 Q And you said that meeting took place maybe two or three
23 weeks after your initial conversation with Mr. Greebel,
24 correct?

25 A Yes.

Rosensaft - Cross - Smith

8702

1 Q And at that first meeting, Mr. Shkreli said that
2 MSMB Capital was a hedge fund, right?

3 A Yes.

4 Q And he also said that he had had a trading loss for
5 MSMB Capital which resulted in him losing the investors'
6 money at MSMB Capital, correct?

7 A That's right.

8 Q And the SEC was asking questions about that trading
9 loss?

10 A Correct.

11 Q And the SEC is a civil regulatory authority; is that
12 correct?

13 A That's right.

14 Q And the SEC can't bring any criminal charges?

15 A No.

16 Q At that first meeting at the offices where Mr. Greebel
17 and Mr. Shkreli were present and you were discussing the
18 trading losses for MSMB Capital, Retrophin didn't come up at
19 that meeting, right?

20 A I don't remember -- specifically remember Retrophin
21 coming up. Although I learned about Retrophin early in the
22 representation.

23 Q And in addition to that first meeting with Mr. Shkreli
24 and Mr. Greebel, you had one or two other meeting in that
25 same time period of early 2013; is that right?

Rosensaft - Cross - Smith

8703

1 A That sounds right.

2 Q And those early meetings were also attended by you and
3 Mr. Shkreli and Mr. Greebel?

4 A I don't remember if Mr. Greebel was at every one. He
5 was definitely at multiple ones, though.

6 Q And those meetings you were also discussing the loss of
7 the MSMB Capital investors' money?

8 A Yes.

9 Q All right. And at the time of the first meeting with
10 Mr. Shkreli and Mr. Greebel, Mr. Shkreli had received a
11 *subpoena* from the SEC and responded to it; is that right, on
12 his own?

13 A Yes. Although I don't remember if it was a *subpoena* or
14 a request, but he had responded to it on his own.

15 Q And at that point that you were having these first
16 meetings, you had not yet received a second request from the
17 SEC for documents, correct?

18 A I can't remember.

19 Q And you had said that in that initial conversation with
20 Mr. Greebel, he explained that Mr. Shkreli had handled the
21 request for SEC documents on his own, right?

22 A That's right.

23 MR. DUBIN: Your Honor, could we have a timeframe
24 for that conversation?

25 Q And that initial conversation was in December of 2012

Rosensaft - Cross - Smith

8704

1 or January of 2013, correct?

2 A That's my memory.

3 Q And we also saw the both the initial SEC request for
4 documents and Mr. Shkreli's response, correct?

5 A Yes.

6 Q And you have a clear memory of exactly when you saw
7 that initial request and Mr. Shkreli's response?

8 A That is correct.

9 Q But you would have reviewed the request and
10 Mr. Shkreli's response before you accompanied Mr. Shkreli
11 for his testimony before the SEC in August of 2013; is that
12 right?

13 A Yeah, absolutely.

14 Q All right. And then Mr. Greebel asked you to keep him
15 updated on what was going on with the SEC investigation,
16 correct?

17 A Yes.

18 Q And you did keep him updated throughout to SEC
19 investigation, right?

20 A That is correct.

21 Q You let him know when the SEC made document requests --

22 A Yes.

23 Q -- right?

24 A Yes.

25 Q And you let him know when the SEC wanted to take

Rosensaft - Cross - Smith

8705

1 testimony from Mr. Shkreli?

2 A Yes.

3 Q And you were asked on direct if Mr. Greebel was
4 involved in helping gathering documents for SEC's requests.
5 Do you remember that?

6 A Yes, I do.

7 Q I'm going to show you what has been marked as
8 Government's Exhibit 116-31 for identification.

9 A Is it in one of my tabs?

10 Q It's not there.

11 A Okay.

12 Q Can you read it on the screen?

13 A I can, but if you blow it up a little bit more, it
14 might help.

15 Q I think we might have a second one. Hold on.

16 (Pause in proceedings.)

17 Q Actually there is apparently a binder all the way up
18 there.

19 A Okay.

20 THE COURT: Do you want -- he's got one on his
21 desk.

22 MS. SMITH: Yes. I think that's right -- okay.

23 Q Yes. If you could look at Tab 1, please.

24 MS. SMITH: My paralegal is always two steps ahead
25 of me.

Rosensaft - Cross - Smith

8706

1 A Okay.

2 Q And do you recognize this document?

3 A Yes.

4 Q And is it your memory that Mr. Greebel was involved in
5 helping gather documents to respond to SEC's request for the
6 MSMB Capital SEC investigation?

7 A Not gathered documents. I see this e-mail where he
8 contacted Marek with respect to gathering documents.

9 Q Okay.

10 A I believe this was just kind of an introduction,
11 though.

12 Q Do you have a memory of him at other points in the
13 investigation gathering documents for SEC's responses.

14 A Not that I remember.

15 Q Okay.

16 All right. I'm going to show you what has been
17 marked -- or what is in evidence as Government
18 Exhibit 857-A. And if you could just look at this first
19 e-mail here.

20 THE COURT: Is it in his binder?

21 MS. SMITH: It's not actually in the binder,
22 Your Honor.

23 THE COURT: Okay.

24 Q And do you recognize this as a --

25 MR. DUBIN: Your Honor, could we just correct the

Rosensaft - Cross - Smith

8707

1 record?

2 MS. SMITH: I'm sorry. I should have --

3 Q The document says via e-mail; is that right?

4 A It does.

5 Q And is this a cover letter attaching an invoice?

6 A (No audible response.)

7 Q Does it say attaching an invoice?

8 A Yes.

9 Q And if we could turn to Page 7 of this .pdf, which ends
10 in Bates Number 133?

11 A (Witness complies.)

12 Q And if we could focus in on the top section there, and
13 who is Tenley Mochizuki?

14 A Well, she is an associate who worked with me on this
15 matter.

16 Q And could you just read her time entry there?

17 A Communications with E. Greebel, M. Rosensaft,
18 D. Kravitz, and R. Brady, Re: Collection of documents for
19 production to SEC. Oversee creation of document database,
20 review publicly filed documents for Retrophin, Inc., draft
21 cover letter enclosing production, and FOYA request letter
22 and send to M. Rosensaft for comments.

23 Q And can you also turn to Page 8 of the .pdf and focus
24 on the time entry from the December 30th -- also from Tenley
25 Mochizuki? Can you read that entry?

Rosensaft - Cross - Smith

8708

1 A Communications with E. Greebel, Re: Further document
2 collection for response to latest SEC *subpoenas*. Review
3 e-mails from M. Rosensaft, R. Brady, and SEC, read technical
4 issues with last production to SEC.

5 Q And then if we can also look further down the page on
6 January 4th -- I'm sorry, excuse me -- January 2nd of 2014
7 from Ms. Mochizuki? And can you just read that entry?

8 A Communications with E. Greebel and M. Harrison,
9 Retrophin controller. Re: Document collection to
10 supplement response to latest SEC *subpoenas*. Review and
11 analyze bank statements and subscription agreements, draft
12 summary of documents, and send to M. Rosensaft.

13 Q Turning back to the early meetings that you had with
14 Mr. Greebel and Mr. Shkreli, you said that at some point you
15 learned about Retrophin; is that right?

16 A Yes.

17 Q And what kind of company was Retrophin?

18 A It was a health care company.

19 Q And Retrophin was also a client of Mr. Greebel's,
20 correct?

21 A That's correct.

22 Q And Mr. Shkreli told you in one of those early meetings
23 with himself and Mr. Greebel, that although he had lost the
24 investors' money in MSMB Capital, they had gotten Retrophin
25 shares; is that right?

Rosensaft - Cross - Smith

8709

1 A Correct.

2 Q And you didn't have an understanding of exactly how the
3 MSMB Capital investors had gotten the Retrophin shares,
4 right?

5 A That's right.

6 Q And Mr. Greebel never told you how the MSMB Capital
7 investors got the Retrophin shares, correct?

8 A Not that I remember.

9 Q So in connection with your work on the SEC
10 investigation as you testified on direct, you came to learn
11 about an arbitration between Merrill Lynch and Mr. Shkreli,
12 MSMB Capital, Mr. Biestek related to the Orex trading losses
13 that it caused the loss of the investors' money in
14 MSMB Capital, correct?

15 A Yes.

16 Q And you learned about that Merrill Lynch arbitration
17 when the SEC asked for documents related to the arbitration;
18 is that correct?

19 A That's correct.

20 Q And you weren't told by Mr. Shkreli about the
21 Merrill Lynch arbitration in an oral meeting discussing the
22 SEC investigation, correct?

23 A I don't believe I was told that.

24 Q And Mr. Greebel didn't tell you about this
25 Merrill Lynch arbitration at those early meetings either?

Rosensaft - Cross - Smith

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1 A Not that I remember.

2 Q And at some point after you learned about the
3 Merrill Lynch arbitration, Mr. Shkreli told you as you
4 testified on direct that he had paid the settlement
5 personally and with respect to MSMB Health Care, correct?

6 A No. That's not correct what he initially told me.

7 Q So what did he tell you initially?

8 A He told me that he had paid the settlement himself.

9 Q And as the SEC investigation progressed, the SEC asked
10 for documents to show that payment; is that right?

11 A That's right.

12 Q And when Mr. Shkreli provided the documents in
13 connection with the payment, it turned out that part of the
14 payment to the MSMB arbitration had come from Mr. Shkreli's
15 other hedge fund, MSMB Health Care; is that right?

16 A That's right.

17 Q And at that point, Mr. Shkreli told you that the money
18 that had come from MSMB Health Care was a loan to himself;
19 is that right?

20 A Yes.

21 Q And you discussed with Mr. Greebel the fact that
22 Mr. Shkreli had paid part of the Merrill Lynch arbitration
23 settlement with a personal loan with money taken from
24 MSMB Health Care, correct?

25 A That's right.

Rosensaft - Cross - Smith

8711

1 Q And Mr. Greebel agreed that Mr. Shkreli should repay
2 that loan, right?

3 A Yes.

4 Q So Mr. Greebel never told you that he had discussions
5 with Mr. Shkreli about payments for the Merrill Lynch
6 settlement before the payments --

7 MR. DUBIN: Objection --

8 Q -- were made?

9 MR. DUBIN: I'm sorry.

10 Objection, Your Honor.

11 THE COURT: All right. Is this in need of a
12 sidebar, or do you want to give me grounds for your
13 objection in one word? I mean, just enough so we --

14 MR. DUBIN: Assumes facts not in evidence,
15 Your Honor.

16 THE COURT: Excuse me?

17 MR. DUBIN: Assumes facts not in evidence.

18 THE COURT: Okay.

19 MS. SMITH: I could proffer facts in evidence at
20 sidebar if you want?

21 THE COURT: All right. If that would help satisfy
22 Mr. Dubin's concern, I think we should.

23 MS. SMITH: Sure.

24 THE COURT: Thank you.

25 (Continued on next page.)

Sidebar Conference

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1 (The following occurred at sidebar.)

2 THE COURT: Okay. So proffer.

3 MS. SMITH: Your Honor, I believe to the testimony
4 of Mr. Delzotto, which primary to the documents that came in
5 through Mr. Delzotto, there are emails back and forth
6 between Mr. Greebel and Mr. Shkreli about the payments for
7 that same. There's an e-mail, I don't remember off the top
8 of my head, about the other things. We talked about a
9 payment of \$125,000 on -- I don't want to get it wrong -- I
10 think January 18th, 2013, and I believe they delayed the
11 other big payment until March. And as you remember, those
12 payments line up exactly with when the payments were made in
13 connection with the Merrill Lynch arbitration.

14 I will say that the way I am asking the question
15 is just to confirm that they never had any discussion. No
16 matter what, it is an appropriate question, but that is
17 actually my good-faith basis for asking.

18 MR. PITLUCK: Your Honor, they were repeated on
19 cross with the Government witnesses, You never discussed
20 this? You never talked about what facts were proffered into
21 evidence that were not -- these are in evidence --

22 THE COURT: You are talking too fast. Start over,
23 please.

24 MR. PITLUCK: I was saying, we repeated on cross
25 of the witnesses facts were proffered and asked if he had

Sidebar Conference

8713

1 knowledge of them to confirm that they no understanding of
2 them. There is a basis, factual basis for the question, and
3 it's also asking if he ever -- he did not invest he told us
4 that. So it's proper for both, Judge.

5 MR. BRODSKY: Your Honor, the question is
6 objectionable for two reasons: First, it mischaracterizes
7 completely the record. Ms. Smith said they are relying on
8 inference upon inference upon inference from documents.
9 Now, they may do that at summation. But we have a
10 completely different view of those facts. I am not going to
11 lay them all out here for you.

12 THE COURT: Okay. But don't they have a
13 good-faith basis to ask the question, because that's their
14 view of the facts and there's evidence to support their view
15 of the facts. All you need to ask the question in good
16 faith.

17 MS. SMITH: I mean, you asked questions about
18 Mr. --

19 MR. BRODSKY: Would you mind not interrupting?

20 MS. SMITH: I'm sorry.

21 THE COURT: No. You know, I think that's the
22 baseline for requesting a question.

23 MR. BRODSKY: When we tried to ask questions of
24 people like Mr. Richardson about facts that they didn't have
25 any personal knowledge about, there were objections and they

Sidebar Conference

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1 were sustained, because even though we had a good-faith
2 factual basis for something happening in the record, we
3 could actually prove it, Your Honor correctly ruled at the
4 time that the witness did not have personal knowledge of it.

5 THE COURT: Yes, but she has confirmed that the
6 witness didn't have knowledge, didn't learn about it.

7 MS. SMITH: They just never had discussions
8 about --

9 MR. BRODSKY: May I?

10 MS. SMITH: I'm sorry.

11 MR. BRODSKY: I keep getting interrupted.

12 THE COURT: But the point is that --

13 MR. BRODSKY: But we weren't able to answer the
14 question, Your Honor. So when we wanted to ask certain
15 questions of certain witnesses, and it was clear that they
16 had no personal knowledge of it, because it's clear
17 Mr. Rosensaft has no personal knowledge of any of these
18 e-mail communications that they are interpreting, and it's
19 an unfair question. It is conveying to the jury very, very
20 clearly that this is a fact. And did you know X or did you
21 know Y assumes a fact that they believe is true and we
22 believe is false. So if we get up for example on redirect
23 and we say, Mr. Rosensaft, isn't it true X or isn't it true
24 Y, they disagree with those facts, I'm sure that they are
25 going to objection and so that it mischaracterizes the

Sidebar Conference

8715

1 evidence in the record, and so --

2 THE COURT: Well, if you proffered some basis in
3 the record to ask a question, that's fine. I think -- you
4 know, again, I'm always concerned that we have some
5 good-faith basis for asking a question. And whether or not
6 you agree with the interpretation of that that evidence
7 should be given, I think the question was, Were aware of
8 these communications between Mr. Greebel and Mr. Shkreli on
9 X subject, and they pointed you to an e-mail that is one of
10 the basis for that question.

11 MR. BRODSKY: It's an inappropriate question,
12 Your Honor. Mr. Rosensaft was not on those e-mails. We
13 suggested to the jury in a summary fashion as to what we
14 believe the evidence should be. We have a completely
15 contrary view of that evidence. They can't get up and ask
16 conclusory questions based on their view of the evidence and
17 say, Sir, isn't it true you didn't know about X, Y, or Z?

18 First of all, it's their inference upon inference,
19 Your Honor. It mischaracterizes the testimony and the
20 evidence in the record. It's not coming through testimony
21 or documents.

22 THE COURT: All right.

23 Okay. What's your -- did you have a second ground
24 to --

25 MR. BRODSKY: Yes.

Sidebar Conference

8716

1 THE COURT: Okay.

2 MR. BRODSKY: My second ground, Your Honor, is
3 that it -- first it mischaracterizes the documents in
4 question.

5 Second, Your Honor, it goes beyond -- it's not
6 asking -- they can ask him about his personal knowledge
7 about a subject matter, but they can't go beyond asking
8 personal knowledge and start going, Did you know there was
9 an e-mail communication on this date or that date that
10 Mr. Rosensaft is not on. It's beyond his ability to answer
11 the question because he has no personal knowledge of it. So
12 it lacks foundation to be able to be able to ask this
13 witness questions about documents that he's not on.

14 THE COURT: Okay. I may have misstated the
15 question the Government asked.

16 I think that what we were getting at was whether
17 Mr. Greebel ever told him that he and Martin Shkreli or that
18 Martin Shkreli had communicated certain facts to him?

19 MS. SMITH: Yes, that was the question.

20 THE COURT: So it wasn't about his awareness of
21 the e-mail.

22 MR. BRODSKY: Can you repeat the question, then?

23 THE COURT: Sure.

24 MR. BRODSKY: I believe --

25 THE COURT: I'm sorry.

Sidebar Conference

8717

1 MR. BRODSKY: I believe you can't ask a question
2 of a witness where you know he has no personal knowledge of
3 it and you know it's based on e-mail communications which he
4 is not on, and he's already testified as to what he knows.

5 THE COURT: Well --

6 MR. BRODSKY: I believe that's improper cross.

7 THE COURT: She's just trying to find out whether
8 Mr. Greebel ever communicated certain information to him for
9 which there is an existing e-mail in evidence between
10 Mr. Greebel and Mr. Shkreli about a specific subject, so...

11 MS. SMITH: That's all.

12 THE COURT: Was there a third reason you didn't
13 think it should come in? I just want to make sure I have
14 the whole argument.

15 MR. BRODSKY: Can we restate the question? In the
16 midst of the arguments, I forgot the --

17 THE COURT: Okay. Well, do you want to just tell
18 him what the question was, or would you rather have the
19 court reporter read it back?

20 MR. BRODSKY: No, either way.

21 THE COURT: Okay.

22 MS. SMITH: It's just whether or not Mr. Greebel
23 ever told -- whether Mr. Greebel never told you that he had
24 discussions with Mr. Shkreli about payments for the
25 Merrill Lynch settlement before the payments were made.

Sidebar Conference

8718

1 MR. BRODSKY: So, Your Honor --

2 THE COURT: Isn't it true.

3 MS. SMITH: It's between Mr. Greebel and
4 Mr. Shkreli. I'm not asking whether he knows. I'm asking
5 whether he had a conversation with Mr. Greebel about -- with
6 Mr. Greebel about payments -- I mean, the payments were
7 asked about on direct --

8 MR. BRODSKY: So --

9 MS. SMITH: -- prior to when the payments were
10 made.

11 MR. BRODSKY: So my objection, Your Honor, is she
12 is characterizing it as discussions, and then she referred
13 Your Honor to certain e-mail communications which cannot be
14 characterizes as discussions. And again it's inference upon
15 inference in which she's suggesting that she knows what
16 these e-mails mean when she hasn't ask Mr. Shkreli, she
17 hasn't asked -- she's not able to ask Mr. Greebel.

18 I believe it's a completely improper question. It
19 suggests to the jurors as to what actually took place in
20 these e-mail communications.

21 THE COURT: I think Mr. Brodsky's problem is that
22 you can't establish that those e-mails -- and let's call
23 them just --

24 MR. BRODSKY: Communications.

25 THE COURT: -- communications --

Sidebar Conference

8719

1 MS. SMITH: Okay.

2 THE COURT: -- were about the Merrill Lynch
3 payments.

4 MS. SMITH: But I have a good-faith basis to ask
5 whether Mr. Greebel ever told him that he did have
6 conversations about the payments. It's -- you know, it's
7 cross-examination. I don't even --

8 THE COURT: Right, right.

9 MS. SMITH: I mean, this is so much more within
10 the cross-examination that many of the questions that were
11 asked by defense in the past eight weeks.

12 THE COURT: Okay.

13 Okay. I'm going to overrule your objection with
14 respect, and I understand your --

15 MR. BRODSKY: Okay, Your Honor.

16 All right. I'm just concerned, Your Honor, that
17 we're heading in a direction where the Government's getting
18 involved in a series of assumptions based on their
19 interpretation of documents that came in with Special Agent
20 Rosato and not testimony, and I believe it's improper to ask
21 a question of a witness who has no personal knowledge of
22 those. It implies, Your Honor, when you ask that question,
23 Did you ever tell any of this, it implies there's an
24 obligation to tell.

25 THE COURT: Okay. Thank you.

Sidebar Conference

8720

(Continued on next page.)

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Rosensaft - Cross - Smith

8721

1 (Sidebar ends; in open court.)

2 BY MS. SMITH:

3 Q So, Mr. Rosensaft, we were talking about the
4 conversation you had with Mr. Greebel where he agreed with
5 you that Mr. Shkreli needed to repay the loan that he had
6 gotten from MSMB Health Care which had been used to pay the
7 Merrill Lynch settlement, right?

8 A Yes.

9 Q And Mr. Greebel never told you that he had discussions
10 with Mr. Shkreli about payments to the Merrill Lynch
11 settlement before those payments were made, correct?

12 MR. DUBIN: Just for the record, just the same
13 objection, that it's...

14 THE COURT: All right. It's overruled.

15 A But before the payments were actually sent in?

16 Q Yes.

17 A No.

18 Q Mr. Shkreli testified before the SEC for the first time
19 on August 7th, 2013 in connection with the SEC investigation
20 of MSMB Capital, right?

21 A That's correct.

22 Q And that testimony, in the testimony the questioning of
23 Mr. Shkreli by one of the two individuals there from the SEC
24 was more hostile than you had expected; is that right?

25 A Yes. One of the attorneys there was definitely more

Rosensaft - Cross - Smith

8722

1 hostile.

2 Q And the focus of the questioning of the SEC testimony
3 was whether or not MSMB investors been told about the
4 trading loss of some of the Orex trades; is that right?

5 A That was one of the topics.

6 Q And after Mr. Shkreli's testify, did Mr. Greebel ask
7 you to tell you what had happened after the testimony?

8 A I don't remember if Mr. Greebel prompted me to tell him
9 or I just called him, but I did convey to him what had
10 happened.

11 Q And Mr. Shkreli testified a second time before the SEC
12 in February of 2014; is that right?

13 A That's correct.

14 Q And is it fair to say that the questions in the second
15 testimony were more aggressive than the questions in the
16 first testimony?

17 A Yes.

18 Q And that the questions in the second testimony were
19 focused on whether Mr. Shkreli had told the truth to
20 MSMB Capital investors, correct?

21 A Yes.

22 Q And you provided updates to Mr. Greebel about the
23 second time that Mr. Shkreli testified before the SEC as
24 well, correct?

25 A That's correct.

Rosensaft - Cross - Smith

8723

1 Q Let's talk a little bit about billing. Who is the
2 principal attorney for MSMB Capital?

3 A Mr. Greebel.

4 (Pause in proceedings.)

5 THE COURT: We can proceed. There was a lapse in
6 the live feed. We have the live feed again.

7 BY MS. SMITH:

8 Q I believe I asked you who is the principal attorney for
9 Retrophin?

10 A It's Mr. Greebel, as that term is used for billing
11 purposes.

12 Q And focusing on billing, when you started doing work
13 for the SEC investigation, you were told by Mr. Greebel that
14 the client for the matter was MSMB Capital; is that right?

15 A Yes, the one that I was working on.

16 Q And so you initially billed your time for MSMB Capital
17 matter number that Mr. Greebel gave you; is that right?

18 A That's correct.

19 Q All right. And when you billed time, either you or
20 your secretary entered that time into the phone system; is
21 that right?

22 A That's right.

23 Q And then after you entered that time, you didn't
24 subsequently review your billing entries to see what bill
25 they wound up on; is that right?

Rosensaft - Cross - Smith

8724

1 A That's correct, I did not review them.

2 Q And you never reviewed any invoicing or billing records
3 for either MSMB Capital or for Retrophin?

4 A That's correct.

5 Q And you also didn't make any decisions about what time
6 should or should not be written off; is that correct?

7 A That's correct.

8 Q Did you bill for all of the work that you did on the
9 SEC investigation?

10 A I entered my time for all the work I did.

11 Q And at some point in 2014 you had a conversation with
12 Mr. Greebel where he said he was transferring your time from
13 one client matter number to another client matter number; is
14 that right?

15 A Yes. Although I can't remember the specific time, but
16 it was later in my representation.

17 Q And at that time he told you to just keep billing as
18 you had been billing; is that correct?

19 A Yes. He said he was transferring my time when he
20 reviewed the bills and I could just keep billing as I had
21 been.

22 Q And at some point after Retrophin got a *subpoena* for
23 documents related to the SEC investigation, you billed some
24 of your time to Retrophin as well; is that right?

25 A That's right.

Rosensaft - Cross - Smith

8725

1 Q Do you know what Project Candlestick is?

2 A I remember the name and I remember it being a billing
3 matter. I don't remember specifically what it is, though,
4 no.

5 Q And earlier we talked about your compensation and how
6 it was set for your first two years at Katten. During that
7 period, you did not pay close attention to the realization
8 rates for your matters; is that right?

9 A When I started, I didn't even know what that was. But,
10 yes, I didn't pay close attention until later on.

11 Q And at some point later on when you got closer to being
12 evaluated for compensation on a yearly basis, the issue of
13 whether the time that you had billed was actually paid,
14 became something that you did care about; is that right?

15 A Yes.

16 Q Okay.

17 A Although I should say, I always cared about it, but
18 that was when I became more attentive to it.

19 Q At the time of your SEC investigation, and let's say it
20 went between the period that we talked about, you know,
21 December of 2012 or January 2013 until September of 2014?

22 A That's correct.

23 Q So in that time period, you didn't know anything about
24 pretrading shares call Fearnow shares; is that right?

25 A Not that I can remember.

Rosensaft - Cross - Smith

8726

1 Q And you never had a conversation with Mr. Greebel about
2 Fearnow shares, correct?

3 A Not that I remember.

4 Q And at the time of your work on the SEC investigation
5 between 2012 and September of 2014, you didn't know anything
6 about a fall 2013 receiptment of the financials at
7 Retrophin, correct?

8 A Not that I remember.

9 Q And Mr. Greebel didn't tell you anything about a fall
10 of 2013 restatement for the financials at Retrophin?

11 MR. DUBIN: Asked and answered, Your Honor.
12 Objection.

13 THE COURT: Sustain.

14 MS. SMITH: Your Honor, the question was
15 whether -- was he told by Mr. Greebel.

16 THE COURT: Then I will allow the witness to
17 answer that question.

18 A Again, not that I remember.

19 MS. SMITH: If we can get the Elmo?

20 THE COURT: Is this --

21 BY MS. SMITH:

22 Q So I'm showing you what has been marked as
23 Defense Exhibit 9644-A. It was admitted on direct
24 examination. And if we can just look at the cover e-mail
25 here?

Rosensaft - Cross - Smith

8727

1 A Yes.

2 Q Who is the e-mail from?

3 A From Christine Giordano.

4 Q And is it to Mr. Kravitz and Mr. Greebel?

5 A Yes.

6 Q And is the date January 10, 2014?

7 A That's correct.

8 Q And the subject matter is Retrophin, Inc., Director and
9 officer questionnaire, FINRA questionnaire, and lack of
10 agreement signature page; is that right?

11 A Yes.

12 Q And I'm just going to show you the attachment which you
13 were shown on direct examination. And this is a
14 questionnaire for Mr. Shkreli for directors and executive
15 officers; is that correct?

16 A Yes.

17 Q And I just want to direct your attention to the page
18 that you were looking at on direct examination, and that is
19 the page ending in Bate's Number R168832.

20 On direct examination you were asked about the
21 Question 7.6.1 for Mr. Shkreli's questionnaire. And the
22 question asked whether he's ever been a subject of
23 investigation by the SEC and number of other entities. And
24 you testified on direct that Mr. Greebel asked for your
25 advice in answering the question for Mr. Shkreli; is that

Rosensaft - Cross - Smith

8728

1 right?

2 A That's right.

3 (Continued on next page.)

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ROSENSAFT - CROSS - SMITH

8729

1 BY MS. SMITH:

2 Q Were you asked about the question below here, which is
3 question 7.6.2, have you ever been a party to any settlement
4 in connection with the alleged violation of any federal or
5 state securities or commodities law?

6 MR. DUBIN: Objection, Your Honor.

7 THE COURT: Overruled.

8 THE WITNESS: I don't remember being asked about
9 that.

10 BY MS. SMITH:

11 Q I am going to actually also show you the page that ends
12 in Bates number 835.

13 Did Mr. Greebel ask you for your advice on section
14 8.2, which involves lawsuits, investigations, inquiries, or
15 actions?

16 A Not that I remember.

17 MR. DUBIN: Can you give me the Bates number of the
18 last document?

19 MS. SMITH: Sure. The last page was Bates stamped
20 R168835.

21 MR. DUBIN: Thank you.

22 BY MS. SMITH:

23 Q I am showing you what's been marked Bates stamp R168843.
24 And I am going to ask you about question number 19, which
25 discussed relationships and related transactions in excess of

ROSENSAFT - CROSS - SMITH

8730

1 \$120,000, or 1 percent of the average of the company's total
2 assets.

3 Mr. Greebel didn't ask you for your advice on
4 answering this question either, correct?

5 A That's correct.

6 Q You were also asked questions on direct about an
7 individual named Darren Blanton; is that right?

8 A Yes.

9 Q And you never spoke to Darren Blanton, directly?

10 A That's correct.

11 Q And the first time that you were aware of Mr. Shkreli
12 reaching out to Mr. Blanton about the dispute over
13 Mr. Blanton's loss of his money in MSMB Capital was in August
14 2013, after the SEC testimony?

15 A I can't pinpoint it specifically, but it was around that
16 time.

17 Q And you weren't aware of any contact between Mr. Blanton
18 and Mr. Greebel regarding his dispute over the MSMB Capital
19 investment prior to those e-mails in August of 2013 that we
20 looked at, correct?

21 A Correct.

22 Q And prior to those e-mails, you were not aware of any
23 direct contact between Mr. Greebel and any other investor who
24 had a dispute over their MSMB Capital investment, correct?

25 A The e-mail referenced the agreement with Geller, but

ROSENSAFT - CROSS - SMITH

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1 besides that, no.

2 Q And it was your understanding that Mr. Shkreli was going
3 to give Mr. Blanton his own Retrophin shares to resolve their
4 dispute, correct?

5 A Yes.

6 Q You were also asked on direct about conversations that
7 you had related to Mr. Blanton being a consultant for
8 Retrophin where you expressed a concern that he needed to be
9 actually consulting for Retrophin, correct?

10 A Correct.

11 Q And you conveyed to both Mr. Shkreli and Mr. Greebel that
12 Mr. Blanton needed to be a real consultant, correct?

13 A Yes.

14 Q And that he needed to be providing actual services to the
15 company, correct?

16 A That's right.

17 Q And both Mr. Greebel and Mr. Shkreli gave you assurances
18 that he would be, correct?

19 A Mr. Shkreli gave me assurances, Mr. Greebel told me he
20 understood that, that he understood that he had to be a real
21 consultant.

22 Q When you started working on the SEC investigation, you
23 didn't know that Mr. Greebel was attending Retrophin's board
24 meetings, correct?

25 A Correct.

ROSENSAFT - CROSS - SMITH

8732

1 Q And you didn't learn that Mr. Greebel was attending board
2 meetings until very late in your work on the investigation,
3 correct?

4 A That's right.

5 Q And Mr. Greebel never asked you to draft an update for
6 the Retrophin board meetings on the status of the SEC
7 investigation?

8 MR. DUBIN: Objection, Your Honor. Beyond the
9 scope, Your Honor, and assumes facts not in evidence.

10 THE COURT: Sustained.

11 BY MS. SMITH:

12 Q You never spoke to or had any direct contact with
13 Mr. Steve Richardson, correct?

14 A Correct.

15 Q And you never spoke to or had any direct contact with any
16 Retrophin board members, correct?

17 A Correct.

18 Q And you did not attend any Retrophin board meetings,
19 right?

20 A That's right.

21 Q And you testified on direct that at one point you had
22 suggested that the SEC speak to Mr. Richardson and Mr. Blanton
23 about their MSMB Capital investments, correct?

24 A Yes.

25 Q And that was at the direction of Mr. Shkreli, correct?

ROSENSAFT - CROSS - SMITH

8733

1 A It was prompted by a conversation with Mr. Shkreli.

2 Q Because you never met or spoke to Mr. Richardson or
3 Mr. Blanton directly, correct?

4 A That's right.

5 Q And Mr. Greebel never told you that he had met with
6 Mr. Richardson to discuss having him meet with the SEC about
7 the investigation, correct?

8 MR. DUBIN: Objection, Your Honor. Assumes facts
9 not in evidence and mischaracterizes testimony.

10 THE COURT: Overruled.

11 THE WITNESS: Can you read the question.

12 BY MS. SMITH:

13 Q Sure.

14 Mr. Greebel never told you that he had met with
15 Mr. Richardson to discuss having Mr. Richardson meet with the
16 SEC about the investigation, correct?

17 MR. DUBIN: Objection. Assumes facts not in
18 evidence. Mischaracterizes the testimony.

19 THE COURT: We will have a sidebar on this, if you'd
20 like.

21 (Sidebar conference.)

22 (Continued on the next page.)

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SIDEBAR CONFERENCE

8734

1 (WHEREUPON, the following proceedings were had at
2 sidebar, out of the hearing of the open courtroom, to wit:)

3 MR. DUBIN: Your Honor, there is no evidence in this
4 record that there was any meeting between Mr. Greebel and
5 Mr. Richardson, not even by Mr. Richardson's testimony. He
6 alleges a phone call, but there was no meeting. And there was
7 no -- there's no evidence that there was a meeting. So this
8 is -- this is a classic mischaracterization of testimony in
9 assuming facts not in evidence. It is improper.

10 MS. SMITH: I don't -- frankly, I mean,
11 Mr. Richardson said -- I believe he said that he met with
12 Mr. Greebel to discuss. If they discussed it on the phone
13 call, I am happy to say Mr. Greebel never said that he had a
14 phone call with Mr. Richardson, but that is in evidence, that
15 they spoke about Mr. Richardson, asked by Mr. Shkreli, to talk
16 to the SEC. He went to Mr. Greebel before he went to the SEC
17 to make sure that it had nothing to do with Retrophin, and he
18 got an assurances that it didn't. And then he went in and
19 spoke to the SEC.

20 THE COURT: So maybe you should characterize it as
21 communication with Mr. Greebel rather than a meeting. That
22 should assuage the concern about --

23 MR. DUBIN: Withdraw the question.

24 THE COURT: I will strike the question.

25 MR. DUBIN: Thank you.

SIDEBAR CONFERENCE

8735

1 THE COURT: She will start it over.
2 (Sidebar conference ends.)
3 (Continued on the next page.)
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ROSENSAFT - CROSS - SMITH

8736

1 (Open court.)

2 THE COURT: The government's last question will be
3 stricken from the record, and she will rephrase the question.

4 BY MS. SMITH:

5 Q Mr. Rosenshaft, Mr. Greebel never told you that he had
6 communications with Mr. Richardson to discuss having
7 Mr. Richardson meet with the SEC about the investigation,
8 correct?

9 A That's correct.

10 Q You were asked on direct examination about a number of
11 subpoenas that both MSMB Capital and Retrophin received in
12 connection with the SEC investigation. I am going to show you
13 what's been marked as Government Exhibit 113-36, which is tab
14 9 of your binder.

15 A Okay.

16 MS. SMITH: And I actually believe this is a defense
17 exhibit that was admitted on direct examination, but I don't
18 have the defense number. So if Mr. Dubin agrees, I can either
19 put it in as a government exhibit or we can figure out what
20 the defense exhibit number is for it.

21 MR. DUBIN: We can admit it as a -- I just don't
22 have it in front of me. We can admit it as a government
23 exhibit, and it is duplicate -- it is in evidence already as
24 DX-121-6.

25 BY MS. SMITH:

ROSENSAFT - CROSS - SMITH

8737

1 Q So I will -- if you can look at tab 9, and then I will
2 use the ELMO with the -- my version. But it is the defense
3 exhibit number that Mr. Dubin just used.

4 MR. DUBIN: I am fine with you showing it, if you
5 want to show it on the screen, showing the jury.

6 MS. SMITH: Okay. So, Ms. Balbin, if you can bring
7 up 113-36 on the prosecution laptop.

8 THE COURT: Didn't you say 113-36, or is it 116?

9 MS. SMITH: 116-36.

10 BY MS. SMITH:

11 Q And I believe you were shown this on direct examination,
12 it is an e-mail from Mr. Schmidt to yourself, on November 25,
13 2013. And it is attaching two subpoenas; is that right?

14 A That's right.

15 Q One is to Retrophin, and the other one is to Martin
16 Shkreli and MSMB Healthcare?

17 A Correct.

18 Q And what's the date again on that e-mail?

19 A November 25, 2013.

20 Q And I am going to show you what's been marked for
21 identification as Government Exhibit 646. And that's tab 8 in
22 your binder.

23 MR. DUBIN: Your Honor, I object. It is hearsay.

24 MS. SMITH: I was showing it to him for
25 identification first.

ROSENSAFT - CROSS - SMITH

8738

1 BY MS. SMITH:

2 Q So do you recognize this document?

3 A I do.

4 Q And is it a document that you sent?

5 A Yes.

6 Q And it is a document that you sent to Mr. Greebel?

7 A Yes, and Mr. Shkreli.

8 Q And is it an update in connection with the SEC
9 investigation?

10 A Yes.

11 MS. SMITH: Your Honor, the government offers
12 Government Exhibit 646.

13 MR. DUBIN: Object. It is hearsay, Your Honor.

14 THE COURT: Overruled.

15 (Government Exhibit 646 received in evidence.)

16 BY MS. SMITH:

17 Q So if we can look at Government Exhibit 646, now in
18 evidence. And, again, that's an e-mail from yourself; is that
19 correct?

20 A That's right.

21 Q And it is sent on the same date as the e-mail we looked
22 at from Mr. Schmidt, correct?

23 A Yes.

24 Q And it is to both Mr. Shkreli and Mr. Greebel?

25 A That's right.

ROSENSAFT - CROSS - SMITH

8739

1 Q And in the e-mail you are providing an update about your
2 conversation with Mr. Schmidt; is that correct?

3 A Yes.

4 Q And then he indicated that he wanted to send -- in that
5 update you are conveying that Mr. Schmidt wanted to send a
6 subpoena for additional documents, including to Retrophin,
7 correct?

8 A That's right.

9 Q And this is one of the updates that you provided to
10 Mr. Greebel about the status of the investigation as it
11 proceeded, correct?

12 A Yes.

13 Q And as you testified on direct, at some point you learned
14 that the bill for the SEC investigation had not been paid; is
15 that correct?

16 A That's right.

17 Q It was your understanding that it had gone out, but it
18 hadn't actually -- no money for it had come in, correct?

19 A That's right.

20 Q And you testified on direct that it occurred sometime in
21 the spring of 2014; is that right?

22 A That's my best recollection.

23 Q At that point did you know whether or not bills for other
24 MSMB Capital or Retrophin matters were being paid?

25 A I did not.

ROSENSAFT - CROSS - SMITH

8740

1 Q And you learned that the bill for the SEC investigation
2 had not been paid at a meeting at Retrophin's offices,
3 correct?

4 A That's correct.

5 Q And that was a meeting with Mr. Shkreli and Mr. Greebel,
6 right?

7 A Yes.

8 Q And is it fair to say that when you heard that the bill
9 hadn't been paid, you were surprised?

10 A Yes.

11 Q And that you were a little bit upset; is that fair?

12 A "Annoyed" is the word I used, but yes.

13 Q And after you learned that the SEC investigation had not
14 been paid, Mr. Shkreli left the meeting for a short period; is
15 that right?

16 A Yes.

17 Q And you asked Mr. Greebel at that point about the bill
18 not being paid, correct?

19 A Correct.

20 Q And he assured you that the bill would be paid, correct?

21 A Yes.

22 Q And when Mr. Shkreli returned to the room, he told you in
23 front of Mr. Greebel that the board had agreed to indemnify
24 him for the cost associated with the SEC investigation of MSMB
25 Capital; is that right?

ROSENSAFT - CROSS - SMITH

8741

1 A That's correct.

2 Q And indemnify him just means Retrophin was going to pay
3 the bill; is that right?

4 A Yes.

5 Q And Mr. Greebel did not disagree with Mr. Shkreli when he
6 said that; is that right?

7 A I don't remember him saying anything in response.

8 Q And after that conversation, you followed up with
9 Mr. Greebel a few months later and asked if the bill had been
10 paid; is that right?

11 A Yes.

12 Q And Mr. Greebel said at that point that the board just
13 had to vote on actually paying for the bill; is that correct?

14 A Yes.

15 Q And at the end of September of the 2014, you never had a
16 discussion with Mr. Greebel about sending Mr. Shkreli the bill
17 for the SEC investigation, correct?

18 A Not that I remember.

19 Q And at the end of September 2014, Mr. Greebel never
20 discussed with you a plan to remove members of the Retrophin
21 board of directors, who are not favorable to Mr. Shkreli,
22 correct?

23 MR. DUBIN: Objection, Your Honor.

24 I objected, Your Honor.

25 THE COURT: I know you did. I am just waiting for

ROSENSAFT - CROSS - SMITH / REDIRECT - DUBIN

8742

1 your one-word basis.

2 MR. DUBIN: It's outside the scope, Your Honor.

3 THE COURT: Okay. I will sustain your objection.

4 MS. SMITH: Can you hold on one moment, Your Honor.

5 THE COURT: Yes.

6 (Short pause.)

7 MS. SMITH: Thank you, Your Honor. I have no more
8 questions.

9 THE COURT: Redirect?

10 MR. DUBIN: Yes, Your Honor.

11 THE COURT: All right.

12 REDIRECT EXAMINATION

13 BY MR. DUBIN:

14 Q Mr. Rosenshaft, you were asked some questions about this
15 conversation where you -- where Martin Shkreli told you that
16 the board was going to indemnify them. You recall those
17 questions just a minute ago?

18 A Yes.

19 Q And then you were asked whether or not the board --
20 whether or not Mr. Greebel said anything when Martin Shkreli
21 said that, correct?

22 A Yes.

23 Q Did you have any reason to believe that Mr. Greebel -- or
24 strike that.

25 Did you have any reason to believe that Mr. Greebel

ROSENSAFT - REDIRECT - DUBIN

8743

1 was in possession of any information that would contradict
2 what Martin Shkreli said?

3 MS. SMITH: Object to leading, Your Honor.

4 THE COURT: Sustained.

5 BY MR. DUBIN:

6 Q You accepted the representation that Martin Shkreli made,
7 correct?

8 A Yes.

9 Q Was there anything peculiar or odd to you that Evan
10 Greebel did the same thing?

11 MS. SMITH: Objection to what Mr. Greebel --

12 THE COURT: Sustained.

13 BY MR. DUBIN:

14 Q Now, you were shown some bills from the early part of
15 2014, and time entries in December 2013 or 2014, correct?

16 A Yes.

17 Q And when was the first time you recall meeting Martin
18 Shkreli, for the first time?

19 A It was in early 2013. It was a few weeks after I was
20 introduced to him on the telephone.

21 Q Is it possible that you're mistaken about that?

22 A Anything's possible, it was a long time ago.

23 Q Okay. So I am going to --

24 MR. DUBIN: May I approach, Your Honor?

25 THE COURT: Yes.

ROSENSAFT - REDIRECT - DUBIN

8744

1 BY MR. DUBIN:

2 Q I am going to hand you a series of exhibits, GX-837,
3 GX-838, GX-839, GX-840, GX-841, and then GX-842, and I flagged
4 for you time entries, okay. And I ask you just to look
5 through these and see if this refreshes your recollection as
6 to when you actually first met him.

7 THE COURT: Do you mean in person or just
8 communicating?

9 MR. DUBIN: In person. Yes. In person.

10 THE COURT: These are in evidence, for the record.

11 MR. DUBIN: Yes, Your Honor.

12 THE WITNESS: I don't seem to be on the first one.

13 BY MR. DUBIN:

14 Q Okay. Let me just put a question to you as you are
15 looking through them.

16 A Okay.

17 Q Could it be that you're mistaken and that your first time
18 entry regarding meeting Martin Shkreli about the active SEC
19 investigation isn't until May?

20 MS. SMITH: Object to form, Your Honor.

21 BY MR. DUBIN:

22 Q Or June, rather.

23 MS. SMITH: Still object to form.

24 THE COURT: Could you rephrase your question,
25 Mr. Dubin.

ROSENSAFT - REDIRECT - DUBIN

8745

1 BY MR. DUBIN:

2 Q The first time entry regarding a meeting between you and
3 Mr. Shkreli, a physical meeting in person, isn't until June?

4 MS. SMITH: Objection to form, Your Honor. It is
5 leading.

6 THE COURT: I'll overrule it, but, you know, this
7 would maybe go faster if you could just maybe refer the
8 witness to the specific --

9 MR. DUBIN: Well, I don't want to take him through
10 every invoice, Your Honor.

11 BY MR. DUBIN:

12 Q Sitting here, would you be able to point the jury -- do
13 it this way, and then we can deal with it later.

14 Would you be able to point to the jury in any of the
15 exhibits before you to a time entry between the beginning of
16 the year -- and I flagged the ones that you're on related to
17 the SEC -- would you be able to point the jury to any -- a
18 single time entry that reflects a meeting between you and
19 Martin Shkreli prior to June, regarding the SEC investigation?

20 A You may have handed me the wrong exhibits. I don't seem
21 to be on the pages you flagged.

22 Q No, I think they're the right exhibits. They're bills,
23 and that was my point.

24 Is there a time entry that you can point the jury
25 to, or that you recall sitting here, in which -- that reflects

ROSENSAFT - REDIRECT - DUBIN

8746

1 a meeting with you and Martin Shkreli regarding the SEC
2 investigation prior to June?

3 MS. SMITH: Objection to compound, Your Honor.

4 THE COURT: Try to rephrase your question,
5 Mr. Dubin.

6 MR. DUBIN: Let me show you -- can we just put up
7 857-A.

8 THE COURT: Government 857-A?

9 MS. SMITH: It is a government exhibit.

10 MR. DUBIN: Yes. It is already in evidence.

11 THE COURT: Thank you.

12 BY MR. DUBIN:

13 Q And can we go to page 2 or 3, if you can skip to the next
14 page --

15 THE COURT: Mr. Dubin, keep your voice up, or turn
16 your mikes on over there.

17 MR. DUBIN: I will, Your Honor.

18 BY MR. DUBIN:

19 Q See the first entry, June 4, 2013, and it says meeting
20 with M. Shkreli and E. Greebel to discuss investigation?

21 A Yes.

22 Q Sitting here today, can you point the jury to any entry
23 in any bill before this date that reflects a meeting between
24 you and Martin Shkreli about the SEC investigation?

25 A I'd have to review this entire stack of documents.

ROSENSAFT - REDIRECT - DUBIN

8747

1 Q Could it be -- just to speed it up.

2 Could it be that you're mistaken about the time you
3 first met him, and that it wasn't until June?

4 MS. SMITH: Objection to asked and answered,
5 Your Honor.

6 THE COURT: Sustained.

7 BY MR. DUBIN:

8 Q You were asked some questions about the restatement; do
9 you recall that?

10 A Yes.

11 Q And I think you were asked whether or not Evan Greebel
12 ever communicated to you anything about the restatement; do
13 you recall that?

14 A Yes.

15 Q And you said, not that you remember, correct?

16 A Correct.

17 Q Is it possible that he told you and you just don't
18 recall?

19 A It is possible.

20 Q Okay. And you were asked some questions about the
21 Merrill Lynch arbitration; do you recall that?

22 A Yes.

23 Q Do you know one way or another whether or not Mr. Greebel
24 was involved at all in that arbitration?

25 A From what I know, I don't believe he was.

ROSENSAFT - REDIRECT - DUBIN

8748

1 Q Okay. You were shown Government Exhibit 116-31, and it
2 was put into evidence; do you recall this?

3 A Yes.

4 Q Do you recall, sir, whether what's on the screen was
5 something that you sent to Evan Greebel, and that he just cut
6 and pasted and forwarded in that e-mail?

7 A I do remember giving him the categories, so that would be
8 the bullet points. The rest of the e-mail, I don't think I
9 gave him.

10 Q Let me see if I can show you something that would refresh
11 your recollection.

12 Showing you what I will mark for identification --

13 MR. DUBIN: May I approach, Your Honor?

14 THE COURT: Yes, you may.

15 BY MR. DUBIN:

16 Q -- as DX-202-23.

17 MR. DUBIN: And I apologize for approaching before I
18 asked.

19 THE COURT: That's all right.

20 MS. SMITH: Your Honor, I'm going to have the same
21 objection to this document as I did to the one previously,
22 about reduction.

23 MR. DUBIN: I am just using it to refresh
24 recollection, Your Honor.

25 THE COURT: All right. Well, do you have an

ROSENSAFT - REDIRECT - DUBIN

8749

1 objection to him just using this to refresh --

2 MS. SMITH: Anything can be used to refresh, Your
3 Honor.

4 THE COURT: Okay. Even a napkin.

5 MS. SMITH: Even a napkin.

6 BY MR. DUBIN:

7 Q Your Honor -- sorry. It's Friday.

8 Mr. Rosensaft?

9 A I take it as a compliment.

10 (Laughter.)

11 BY MR. BRODSKY:

12 Q It was intended as a compliment.

13 Does that e-mail that I just put before you, which I
14 marked DX-202-23 for identification, does that refresh your
15 recollection that the exact bullet points that appeared in the
16 government exhibit were what you sent to Evan Greebel, and he
17 just simply cut and pasted and forwarded along?

18 A I don't need my recollection refreshed. That's what I
19 testified to.

20 Q And, in fact, it was what you sent him, word for word,
21 right?

22 A I don't remember if it was word for word or not, but I do
23 remember giving him the categories that he then sent on.

24 Q Okay. Now, you were asked about whether Mr. Greebel told
25 you about Merrill Lynch discussions that he had with Martin

ROSENSAFT - REDIRECT - DUBIN

8750

1 Shkreli prior to the payment of the Merrill Lynch settlement;
2 do you recall that?

3 A Yes.

4 Q Do you have any knowledge that any such conversations
5 occurred between Evan Greebel and Martin Shkreli?

6 A No.

7 Q Now, you were shown -- can we put back up 9644-A. I
8 believe that is a defense exhibit already in evidence. And if
9 we can flip to the paragraph 7.6.2, and I will give you the
10 Bates stamp in a moment.

11 MR. DUBIN: Is there an attachment to that? Is
12 there multiple pages in that, Mr. Carter? Bates stamp
13 R168832. Thank you, Mr. Carter. Can we show 7.6.2, please.

14 BY MR. DUBIN:

15 Q It says: Have you been a party to any settlement in
16 connection with an alleged violation of any federal or state
17 securities or commodities law.

18 Do you remember being asked about this during the
19 cross-examination a little while ago?

20 A Yes.

21 Q And then you were asked a question about the Orex trade,
22 right?

23 A I don't remember the order, but I was asked questions
24 about that.

25 Q Sir, the Orex trade doesn't involve a violation of SEC

ROSENSAFT - REDIRECT - DUBIN

8751

1 law, federal or state securities or commodities law, does it?

2 A I think there was a regulation related to that trade that
3 was violated.

4 Q A regulation?

5 A Yes.

6 Q Right. But that was a repayment of money that Martin
7 Shkreli -- excuse me, not repayment, but it was money that
8 Martin Shkreli owed, correct?

9 A To Merrill Lynch, yes.

10 Q Right. And there was no -- there was a settlement,
11 right?

12 A Yes.

13 Q Right. And in the settlement, do you know -- did you
14 read the settlement agreement?

15 A I don't remember if I did or not.

16 Q So you don't know whether or not there was an allegation
17 that a federal or state commodities law -- federal or state
18 securities or commodities law was a part of that settlement
19 agreement, do you?

20 A As I said, I don't remember.

21 Q So sitting here, you can't opine on whether or not the
22 answer to that is right or wrong, correct?

23 MS. SMITH: Objection, Your Honor.

24 THE COURT: Sustained.

25 BY MR. DUBIN:

ROSENSAFT - REDIRECT - DUBIN

8752

1 Q Do you know if Mr. Greebel advised Mr. Shkreli about how
2 to answer that question?

3 A I do not.

4 Q And do you know whether or not Mr. Greebel took it upon
5 himself to answer that question one way or another?

6 A I do not.

7 Q Do you know whether Mr. Shkreli would sometimes hear your
8 advice but go off and do what he wanted?

9 MS. SMITH: Objection, Your Honor.

10 THE COURT: Sustained.

11 BY MR. DUBIN:

12 Q Did he always follow your advice, sir?

13 MS. SMITH: Objection, Your Honor, to the knowledge
14 of what Mr. Shkreli did.

15 THE COURT: Sustained.

16 BY MR. DUBIN:

17 Q From your understanding, based on what you know, did
18 Mr. Shkreli always follow your advice?

19 A No.

20 Q Okay. Based on what you know, did he always follow
21 Mr. Greebel's advice?

22 MS. SMITH: Objection, Your Honor.

23 THE COURT: Sustained.

24 BY MR. DUBIN:

25 Q Okay. I want to bring you to Bates stamp 8835 in the

ROSENSAFT - REDIRECT - DUBIN

8753

1 same document. And do you see where -- on 8.2, you were asked
2 some questions about that; do you recall those questions?

3 A Yes.

4 Q Do you recall whether or not at the time this was filled
5 out, whether there were actually any lawsuits, investigations,
6 inquiries or action that has affected or involved or has the
7 potential to affect or involve the company? Do you know one
8 way or another?

9 A I would say yes, as to that one.

10 Q Okay. And to that one, do you know whether or not,
11 again, Evan Greebel ever advised Martin Shkreli about what --
12 how he should answer that?

13 A I do not.

14 Q When it came time to ask a question about this D&O form,
15 Mr. Greebel asked you a question about one -- Mr. Greebel
16 sought your advice on one question, right?

17 A Correct.

18 Q And from what you know, he communicated that advice to
19 Mr. Shkreli, correct?

20 MS. SMITH: Objection to the leading, Your Honor.

21 THE COURT: Sustained. Sustained. Sustained.

22 BY MR. DUBIN:

23 Q Did he, from what you understand, communicate that
24 advice?

25 MS. SMITH: Objection to asked and answered.

ROSENSAFT - REDIRECT - DUBIN

8754

1 THE COURT: Sustained.

2 BY MR. DUBIN:

3 Q For any question on this form, do you know if Martin
4 Shkreli asked Evan Greebel any questions other than the 7.6.1?

5 A I don't know what Mr. Shkreli asked Mr. Greebel.

6 Q Okay. Now, you were asked some questions about the
7 Blanton consulting agreement; do you recall that?

8 A Yes.

9 Q All right. Now, do you know whether or not Mr. Blanton
10 ended up performing consulting work?

11 A I do not.

12 Q You were asked some questions about Mr. Richardson; do
13 you recall those questions?

14 A Yes.

15 Q And about whether or not anything was communicated to you
16 about conversations that occurred between Mr. Richardson and
17 Mr. Greebel; do you remember that?

18 A Yes.

19 Q You have never met Mr. Richardson, have you?

20 A I have not.

21 Q Do you have any knowledge sitting here today about
22 Mr. Richardson's reputation for truthfulness?

23 MS. SMITH: Objection, Your Honor.

24 THE COURT: Sustained.

25 BY MR. DUBIN:

ROSENSAFT - REDIRECT - DUBIN

8755

1 Q Do you know whether or not Mr. Richardson ever said
2 anything to Mr. Greebel that wasn't so?

3 MS. SMITH: Objection, Your Honor.

4 THE COURT: Sustained.

5 BY MR. DUBIN:

6 Q You were asked some questions about the board
7 indemnification. Actually, let me just actually ask you one
8 last question about Mr. Richardson.

9 Do you recall that you were aware -- do you
10 remember -- strike that.

11 Do you remember you were asked some questions by
12 Ms. Davis -- Ms. Smith about whether or not you were aware of
13 Mr. Richardson going and testifying to the SEC?

14 A Yes.

15 Q Okay. Do you recall that you were made aware that he
16 received a subpoena to testify before the SEC?

17 A I don't remember that.

18 MR. DUBIN: I would like to -- may I approach,
19 Your Honor?

20 THE COURT: Yes.

21 BY MR. DUBIN:

22 Q I am going to show you what I have marked for
23 identification as DX-202-22. This was an e-mail that you
24 received from Martin Shkreli on March 9, 2014. Correct?

25 A Yes, that's what it says.

ROSENSAFT - REDIRECT - DUBIN

8756

1 Q And do you recall when it was that Mr. Richardson went
2 and was interviewed by the SEC?

3 A I don't have a memory that he was interviewed.

4 Q Okay. You don't know one way or another?

5 A Correct.

6 Q Okay. And does it refresh your recollection, reading the
7 top e-mail, the last paragraph -- excuse me, the last
8 sentence, that you were made aware that Mr. Richardson got a
9 subpoena from Eric Schmidt of the SEC to come in and
10 testify -- or to come in and get interviewed?

11 A I see that what's conveyed. I don't have a memory of
12 that, though.

13 Q Okay. I would -- do you recall --

14 MR. DUBIN: Actually, I move DX-202-22 into
15 evidence.

16 MS. SMITH: Objection, Your Honor. It is hearsay.

17 THE COURT: Sustained.

18 BY MR. DUBIN:

19 Q Do you recall receiving this e-mail? Why don't you read
20 through the bottom e-mails as well.

21 MS. SMITH: Objection to asked and answered, Your
22 Honor.

23 MR. DUBIN: I just focused him on the top e-mail, I
24 think, earlier.

25 THE COURT: I think he did, he was asked to read the

ROSENSAFT - REDIRECT - DUBIN

8757

1 whole thing, but --

2 MR. DUBIN: Okay.

3 THE COURT: -- if you want to ask him once again if
4 he recalls it.

5 BY MR. DUBIN:

6 Q Do you recall receiving this e-mail?

7 A I do remember the content of this e-mail, other than that
8 part about the subpoena.

9 MR. DUBIN: I move it in, DX-202-22.

10 MS. SMITH: Objection. It is hearsay.

11 MR. DUBIN: For the effect on the listener.

12 MS. SMITH: We can do it at sidebar.

13 THE COURT: I'm going to sustain the objection.

14 MR. DUBIN: I would like to discuss it, Your Honor.

15 Briefly.

16 THE COURT: All right. Well, we are going to
17 dismiss the jury at 2:00, and --

18 MR. DUBIN: Oh, no. Then I don't want to discuss
19 it.

20 THE COURT: It's fine, but --

21 MR. DUBIN: No.

22 THE COURT: -- if there's recross, you have to give
23 the opportunity --

24 MR. DUBIN: No, it's okay. I think that I -- I have
25 no further questions.

PROCEEDINGS

8758

1 THE COURT: All right. Is there any recross?

2 MS. SMITH: No, Your Honor.

3 THE COURT: All right. Sir, you are excused. Thank
4 you. Have a nice day.

5 THE WITNESS: Thank you, Your Honor.

6 (WHEREUPON, the witness was excused.)

7 THE COURT: Members of the jury, I promised you
8 2:00. So I will dismiss you. Please don't talk about the
9 case. Please consciously avoid any media coverage about
10 anything touching on this case. I will see you Monday at 9:00
11 a.m. Thank you for your attention. Have a good weekend.

12 (WHEREUPON, at 2:00 p.m., the jury exited the
13 courtroom.)

14 (Open court; no jury present.)

15 THE COURT: So we are very close to getting the
16 instructions. We are finishing up. I wanted to focus on the
17 testimony before I approved the last instruction. I think we
18 are ready to upload it soon. It will be uploaded as a draft,
19 Court Exhibit No. 1. All right.

20 (Court Exhibit 1 was received in evidence.)

21 MR. PITLUCK: Is it going to be e-mailed to the
22 parties or ECF?

23 THE COURT: Would you like us to e-mail it to you or
24 put it on ECF? What is the easiest for everybody?

25 MR. KESSLER: Doesn't matter.

PROCEEDINGS

8759

1 MR. PITLUCK: E-mail is probably just as easy,
2 Your Honor.

3 THE COURT: We will do both, how's that?

4 MR. BRODSKY: What time would you like us back?

5 THE COURT: We have a plea and what else?

6 THE COURTROOM DEPUTY: And a quick status.

7 (WHEREUPON, discussion was had off the record.)

8 THE COURT: So why don't you come back at 3:15. Is
9 that all right?

10 MR. BRODSKY: Yes, Your Honor.

11 MR. PITLUCK: Sure. That's fine. Stopping at 4:45?

12 THE COURT: Yes.

13 (WHEREUPON, a recess was had from 2:03 p.m. to 3:15
14 p.m.)

15 (Continued on the next page.)
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25

Proceedings

8760

1 (In open court; 3:24 p.m.)

2 THE COURT: We're ready to go.

3 MR. BRODSKY: I think, your Honor, this is a good
4 timing to do it because it's Friday afternoon and there is
5 some time, but we would request a little bit more time to
6 review it, consider it, and analyze it because it's just
7 difficult to absorb all of it given when it was filed and when
8 we are now.

9 I understand, your Honor, that there's time to do it
10 now, but that would be our request, to have a little more time
11 to absorb it, consider it.

12 THE COURT: Well, I would expect that this will
13 continue to next week. Hopefully, early Monday evening after
14 we finish the trial, but I just want to feel that I need to
15 put on the record that we got submissions on these charges as
16 late as this weekend. And meanwhile, I could count up the
17 number of submissions relating to the ongoing trial that I got
18 this week, and there are a lot of lawyers available to do a
19 multitude of tasks related to this case.

20 There is one judge and there is one law clerk trying
21 to respond to everything, and so I expect that we won't be
22 able to finish tonight in any event, but I want to be very
23 clear that I'm not going to entertain any new instructions
24 unless there are instructions that could not have been, you
25 know, provided because so, for example, we don't know whether

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1 Mr. Greebel is going to testify.

2 So we would have to add that or take it out. But in
3 terms of new iterations of instructions or something
4 different, I'm not willing to entertain more. We have asked
5 for charges and we've given the parties additional time to
6 submit charges. And, at some point, we just have to say to
7 the parties that they've had ample opportunity, and if they
8 haven't provided something by all the numerous deadlines that
9 I've given and extensions of deadlines, we're just not going
10 to be able to entertain more.

11 We'll get started today. We'll get as far as we
12 can, and if we need to continue, we can hear further from the
13 defendants. I just want to be very clear -- and from the -- I
14 just want to be clear, I'm not going to welcome any more
15 submissions about the instructions unless I ask for them.

16 So, for example, if somebody believes that the law
17 requires a particular instruction be given or not given, and
18 you haven't previously had an opportunity to provide law for
19 your positions, I would allow you to do that. But, otherwise,
20 I think, you know, we're going to deal with what we have so
21 far from the parties.

22 MR. BRODSKY: Yes, your Honor.

23 And, your Honor, it is perfectly understandable
24 given the volume of work your Honor has received from us
25 collectively, and certainly, from our side in terms of our

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1 filings and our requests and the issues we're raising which
2 are very critical and some of them unprecedented that -- we
3 completely, your Honor, are not complaining or suggesting that
4 the Court -- you know we expected to receive the draft charge
5 earlier today, in fact, we're amazed that your Honor was able
6 to provide us with a draft charge today given all of your
7 Honor's other work and obligations and this trial this week
8 and the issues.

9 So it's just that your Honor and, again, not
10 suggesting your Honor provided to today was not appropriate,
11 in fact, as I've said it's impressive we just haven't had a
12 chance to absorb the proposed charges, and we just don't want
13 to waive as we go through it and come back, your Honor, on
14 Monday and say, look, on Friday having not had enough time to
15 go through it, we missed that.

16 THE COURT: So we'll continue this not Monday but
17 Tuesday evening. All right. I'll cancel my commitment on
18 Tuesday and make sure we continue if we need to.

19 So let's start. The way I like to do it maybe you
20 were here or the Shkreli charge conference or some of your
21 colleagues were.

22 MR. BRODSKY: I was not here.

23 THE COURT: Mr. Brodsky, my practice is to go
24 through the instructions, and when a party has a particular
25 comment or a suggested edit, then I will, you know, we'll stop

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1 there and we'll talk about it.

2 So why don't we start?

3 General introduction and the general instructions as
4 you may know are fairly standard and they're not atypical and
5 they're not extraordinary or specific necessarily to the case
6 in terms of being something out of the ordinary or
7 complicated.

8 So does anyone have any comment so far on the
9 introductory portions of this?

10 MR. BRODSKY: I'm going through right now, your
11 Honor. I did go through the introduction first page, I'm now
12 scrolling through if you would give us a moment to go through
13 the other ones.

14 THE COURT: Would it be more beneficial to focus on
15 the parties' differences of opinion regarding the instructions
16 on certain topics like multiple conspiracies, wash trades, and
17 lock-ups?

18 MR. BRODSKY: However you want to do it, your Honor.

19 THE COURT: Well, I want to get something done
20 between now and 4:45. So let's do something that the parties
21 are prepared to address.

22 MR. BRODSKY: Well, one thing that we could address,
23 your Honor, is the conscious -- if I would ask your Honor to
24 focus on one thing and notice the conscious avoidance
25 instruction. I believe to have, and I don't know if your

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1 Honor wants to go to that.

2 THE COURT: That's fine.

3 MR. BRODSKY: And I believe your Honor has it on
4 Page 68 of your December 8, 2017, draft jury instructions.
5 It.

6 As we understand it, your Honor, the conscious
7 avoidance instruction should be given; there are a number of
8 prerequisites to give it. One of those prerequisites is there
9 has to be evidence in the record that Mr. Greebel was aware of
10 a high probability of a fact in dispute.

11 And, in addition, there has to be an evidentiary
12 record established that Mr. Greebel consciously avoided
13 confirming that fact. And now, as we went through and
14 analyzed it. We did not see how there was evidence in the
15 record to satisfy those prerequisites and that's established
16 in the case law *U.S. v. Adeniji* which is 31 F.3d 58.
17 Second Circuit 1994. It's established in *United States v.*
18 *Ferrarini*, 219 F.3d 145. Second Circuit 2000.

19 Those were cases where, for example, there were
20 problems with conscious avoidance instructions because those
21 were given, there wasn't a sufficient factual predicate from
22 the record that would permit a rational juror to conclude
23 beyond a reasonable doubt that there was a high probability of
24 some fact in dispute that the -- that Mr. Greebel was aware of
25 it, and that he consciously avoided confirming it.

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1 So we're just concerned about it because we're just
2 not sure what facts the Government thinks they've established
3 in the record Mr. Greebel had this conscious avoidance --
4 they're trying to seek this conscious avoidance predicate and
5 they satisfied the standard.

6 THE COURT: Does the Government wish to address the
7 defense concerns on this?

8 [!EZ SPEAKER 07]: We can. But what we thought
9 would be more helpful on this very specific point because I
10 think I agree with Mr. Brodsky.

11 The two things that seem to cause problems with the
12 conscious avoidance charge are when the instruction that if
13 the defendant actually believed that something was lawful, the
14 defendant can't be convicted. So sometimes that is left out
15 and that causes appellate issues. That's in the Court's
16 charge, so I don't think that's an issue.

17 Then with respect to the factual predicate. What we
18 thought would be helpful to the Court, and we hoped to have
19 ready at this point, but I think now we might do it better on
20 Tuesday is just to provide for the Court, you know, exhibit
21 cites and testimony cites that establish that predicate
22 because we agree with Mr. Brodsky you have to establish the
23 predicate. And I think that would probably be the most
24 helpful way to do it just so everyone can really consider the
25 evidence on that point.

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1 But we agree that the question is really is has the
2 I don't think we have Ferrarini in our draft, but my memory is
3 every one of these cases says the exact same requirements for
4 the charge, the same predicate. We believe they're settled.
5 We thought it would be more helpful to lay things out.

6 THE COURT: I think that would be helpful for the
7 defense and the Court. I just note that *United States v.*
8 *Svoboda*, 347 F.3d 471 at 480. Decided in 2003 by the Circuit
9 provided the same general predicate. It's a more recent case
10 and one that we were looking at in determining.

11 So, for example, the factual predicate regarding
12 consulting agreements or any of the other charged conduct.

13 [!EZ SPEAKER 07]: And, your Honor, I recently had a
14 trial in front of Judge Mauskopf where the defendant was an
15 attorney and this exact same charging question came up and
16 everyone relied on, I think, it's *Svoboda*, however you
17 pronounce it, and a couple of other cases. I don't think the
18 requirements of the law run clear. The question is making
19 sure we satisfy the predicate, we have, but we want to lay it
20 out for the Court just so that everyone is working on the same
21 specific piece of evidence.

22 THE COURT: All right. So what's next?

23 MR. BRODSKY: I can --

24 THE COURT: I'm happy to hear about multiple
25 conspiracies since that seems to be somewhat at issue, or is

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1 that not an issue.

2 I know the Government takes the position of one
3 conspiracy, three means or schemes that are related to that
4 count, Count Seven, and I thought the defense had suggested an
5 instruction on multiple conspiracies. We didn't think it
6 should go in, but I'm happy to hear the defense arguments
7 since it's their suggestion.

8 MR. BRODSKY: Your Honor, I think our view is that
9 you have, although the Government has tried to weave a
10 narrative in Count Seven as one. I think it's three different
11 theories of the case. I think the first one is the
12 MSMB Capital theory of backdating which I know your Honor
13 heard Rule 29 on so we won't repeat it. And I think that's a
14 separate alleged conspiracy from the use of, purported use, of
15 settlement agreements it allegedly misappropriate assets of
16 Retrophin.

17 So I just think that that's, where our view is that
18 they are different alleged conspiracies and it's, I think,
19 it's appropriate to give that instruction that we request to.

20 THE COURT: Does the Government want to be heard?

21 [!EZ SPEAKER 07]: Your Honor, yes. We think the
22 charge is inapplicable here. There is case law in our motion
23 in limine briefing related to the motion to dismiss where both
24 parties address this. I can preview again some of the cases.

25 But basically the point is, the multiple

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1 conspiracies charge. Some case law say it's never an
2 appropriate when there is a single defendant in any event, and
3 all the cases make clear that we would meet our multiple
4 different overlapping maybe related conspiracies and then the
5 charge might be appropriate.

6 So we can have a debate about whether we've shown,
7 you know, the means and methods or provided all the evidence
8 of the conspiracy that's charged in the indictment, but there
9 is one conspiracy. We think there is a conspiracy to
10 misappropriate Retrophin assets. That's how it's charged;
11 that's how it's always been charged; that's how it is.

12 So there can be plenty of argument about whether
13 we've met all the elements beyond a reasonable doubt but
14 there's no, there's nothing coming close to a suggestion that
15 there are multiple different conspiracies.

16 MR. BRODSKY: Your Honor, I know that's their
17 theory, but the MSMB Capital backdating is distinguishable in
18 time period, in alleged participants, and in the nature of the
19 allegation.

20 In the superseding indictment, the charges that are
21 faced with an SEC inquiry, Mr. Shkreli allegedly decided that
22 he needed it to provide shares to MSMB Capital in order to
23 cover up lies that he told to the SEC regarding the assets
24 under management at MSMB Capital. And that is a separate
25 alleged conspiracy from anything to do with Retrophin, Inc.,

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1 did not exist when the MSMB Capital backdating theory was
2 around. Retrophin, Inc., comes into existence on or about
3 December 12, 2012, and it was uncertain whether that would
4 even happen at the time of this purported MSMB Capital
5 backdating theory.

6 And the Government's own superseding indictment is
7 based on this theory that Mr. Shkreli needed to cover up with
8 the SEC by getting assets in MSMB Capital. And the people who
9 were allegedly involved in that, many of them are very clearly
10 adverse to -- at least a few of them -- are adverse when it
11 comes to 2013 post-Retrophin, Inc.

12 I think that there's no question in our mind that
13 the evidence, the Government has failed to satisfy that there
14 is one conspiracy. They may have charged it that way, but
15 that's not how the evidence turned out. And it unquestionably
16 MSMB Capital backdating even though you can try to speculate
17 about it, or you can speculate that Mr. Shkreli did it for a
18 host of other reasons. There's just no evidence in the record
19 backing up any of those reasons that the Government speculates
20 about. And their only reason in the record is what's charged
21 in the indictment about faced with an SEC inquiry.

22 So I just think they're totally different, the
23 backdating, from the settlements and the consulting
24 agreements. And it is a separate alleged conspiracy charge.
25 It is a separate charge.

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1 [!EZ SPEAKER 07]: What's charged in the indictment
2 is a single conspiracy, it cannot be clearer. And I think if
3 the Court wants to review the case law whatever Mr. Brodsky,
4 the defense, cites from their motion in limine briefing, we
5 cited in our ours, the result is not going to charge.

6 MR. BRODSKY: In *United States v. Guybell*, 369 F.3d
7 362. Second Circuit 2004. The Second Circuit said that, "In
8 order to prove a single conspiracy, the Government must show
9 that each alleged member agreed to participate in what he knew
10 to be a collective venture directed toward a common goal."
11 That's the pinpoint cite 689.

12 The MSMB Capital backdating theory of Mr. Shkreli
13 getting shares through MSMB Capital to cover up his lies to
14 the SEC is, you know, one, only evidence of a limited number
15 of people. There's only evidence that Mr. Shkreli only knew
16 about his lies to the SEC. And, two, Retrophin, Inc., didn't
17 exist. So if there is the purported collective venture
18 towards a common goal, and the Government has very clearly
19 laid out with respect to settlements and consulting
20 agreements, the common goal was to defraud Retrophin, Inc., of
21 its assets. MSMB Capital backdating theory. Retrophin, Inc.,
22 does not exist and at the time that this alleged theory
23 occurred, Martin Shkreli, undisputedly in the record, had
24 complete control over Retrophin, LLC and he could do almost
25 anything he wanted with where he wanted to put the assets.

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1 And more than that, it's undisputed that he gifted these
2 shares.

3 And so, you know, he gifted 50,000 Common B Units to
4 Mr. Aselage. Nobody's claiming that those units, which are
5 now worth \$5 million today, are part of some defrauding of
6 Retrophin, Inc. In fact, Mr. Aselage testified he would never
7 give those back, he would not give those back because there
8 wasn't a fraud.

9 So I just think that the Government's theory you
10 have to break it down between pre-Retrophin, Inc., because you
11 can't be defrauding Inc., when it doesn't exist. And
12 post-Retrophin, Inc., which is the Government's theory in
13 Count Seven.

14 THE COURT: My understanding of the evidence so far
15 in the trial, and I could be mistaken, so the Government and
16 the defense can correct me if I'm wrong. My understanding
17 about the backdating scheme was that MSMB Capital had been
18 wiped out financially because of the OREX trade, it had no
19 money. Yet, it continued to send the investors statements
20 that led them to believe that they had, you know, increased
21 the value of their investments.

22 So when Mr. Shkreli used Retrophin shares to gift to
23 MSMB Capital, a significant number of shares, it became a
24 vehicle through which the MSMB Capital investors could be paid
25 in part with Retrophin shares when they became upset and

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1 demanded liquidation or shares in order to compensate them and
2 to make them whole for what think were told was the value of
3 their investment.

4 And so, the shares were part of, I don't know the
5 nomenclature, whether it's a scheme or a predicate act or
6 whatever that is, it is contained within Count One as part of
7 the Count One -- I'm saying "Count One" but I mean Count
8 Seven, Count Seven conspiracy. Count Seven conspiracy to
9 continue to perpetuate the expectation of MSMB Capital
10 investors that they had, in fact, Retrophin and that they
11 would then be able to be paid with Retrophin shares.

12 Now, if I've misstated or misunderstood tell me I'm
13 wrong. I think that's what I understand from the outset.

14 MR. BRODSKY: I don't think that's -- your Honor,
15 respectfully, there's zero evidence. This is a theory and
16 there are three fundamental problems with it.

17 The first fundamental problem is if the common
18 venture is to defraud Retrophin, Inc., the public company, it
19 comes into existence on December 12, 2012, Mr. Shkreli's
20 gifting of, or arrangement, or somehow transfer of his own
21 shares to MSMB Capital cannot be part of any conspiracy to
22 defraud Retrophin, Inc. Because by definition, Retrophin,
23 Inc., A, at that time doesn't exist. And, B, it's his own
24 shares.

25 So when Retrophin becomes a public company, these

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1 75,000 units become Retrophin, Inc. Shares, but it doesn't
2 change the fundamental form that if Mr. Shkreli had kept those
3 shares for himself, he would have owned the shares not
4 Retrophin, Inc.

5 And so, when those shares change on December 12th
6 from units to Retrophin, Inc., common shares -- oh, I'm sorry
7 they changed September 20th to LLC shares, and then when they
8 change in December '12 to become the shares a public company
9 and they had a five times value or seven times value depending
10 on the type of shares, they still remain in kind the same
11 source where they come from.

12 And so, it's an impossibility, your Honor, to have
13 defrauded Retrophin to have a common goal. It can't be a goal
14 to defraud Retrophin with those shares. It's just an
15 impossibility. Because Retrophin, Inc., never owned those
16 shares. And Retrophin, LLC never owned those shares. And so,
17 that's the first fundamental problem.

18 The second fundamental problem with it is that
19 there's zero evidence in the record other than speculation by
20 the Government. There is absolutely no evidence in the record
21 that as of the time that he made these transfers he was
22 somehow thinking that, oh, I'm going to have a public company,
23 and then one day somebody is going to come and seek assets
24 from me and I'm going to now use these gifted shares that are
25 eventually going to become Retrophin shares to pay back

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1 settlements. It's just, to doesn't exist, but the indictment
2 itself is all about faced with a public -- faced with an SEC
3 inquiry. That's the purpose that he did it, and that's what
4 the evidence, actually, if you look at the evidence in the
5 light most favorable to the Government, the backdating theory
6 is supported only with respect to the following, which is on
7 November 29th and on December 3rd when he made those arranged
8 transfer shares. In the light most favorable to the
9 Government, I've got to disagree with the inferences to be
10 drawn.

11 But the only theory that is plausible, if you view
12 every inference in favor of the Government and assume all the
13 facts are true, is that he was trying to cover up for a lie he
14 had told the SEC with respect to how many assets he had under
15 management in MSMB Capital. And that is not event with the
16 same theory under the settlement agreements and the consulting
17 agreement.

18 Now, the Government can come back say, well, our
19 theory is he predicted this would happen. There's no evidence
20 in the record for it, zero. There there's no evidence in the
21 record that somebody at the time he made these transfers was
22 knocking on his door and saying, hey, when you go public, I
23 want to convert my shares and I want a piece of my money back.
24 It just doesn't exist in the record.

25 THE COURT: Well, I think one of the issues before

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1 the jury is whether these transfer occurred late in 2012 or in
2 the summer of 2012.

3 MR. BRODSKY: I'm assuming all the facts as the
4 Government has alleged them to be true which is that the
5 transfer, assume they're current, November 29th and assume
6 they're current December 3rd.

7 THE COURT: All right. Why don't I do this, I'll
8 let the Government speak. But since I've heard from
9 Mr. Brodsky at length.

10 MR. BRODSKY: Sorry.

11 THE COURT: It's all right.

12 And we've also had briefing. Is the Government --
13 did you want to respond at all to Mr. Brodsky?

14 [!EZ SPEAKER 07]: I'm going to say two quick things
15 and I'm happy to do it.

16 The first is read the indictment and it's who is
17 being defrauded from what time periods. Second, there is
18 evidence of a conspiracy about the filing of the 13(d) which
19 occurs when the company goes public. It's not an LLC in
20 December 2012, the company merges to backdating become a
21 public company.

22 We think we can argue about whether the, you know,
23 what the jury will ultimately conclude. But the evidence is
24 clear for a single conspiracy shown in different ways as
25 outlined in the indictment.

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1 MR. BRODSKY: Your Honor --

2 [!EZ SPEAKER 07]: That's what we're resting on it.

3 MR. BRODSKY: It's always hard, your Honor, to argue
4 against an ipse dixit theory which is I say it's so, so it is
5 so. It's clearly so, so it's there. The allegations are
6 alleged clearly, so the allegations are clear. And those kind
7 of tautologies, with all respect to the Government, it's
8 impossible for us to ever demonstrate to your Honor why their
9 theory is ever wrong if the response is always: It's clear.
10 If the response is, the indictment is clear, we're not going
11 to identify the language we're relying on, we're not going to
12 identify any evidence in the record we're relying on. It's
13 just clear because it's clear, we have no response to it.

14 THE COURT: Well, I think the point about clarity is
15 that the indictment charges that the conspirators, utilizing
16 an artifice, fraud, conspired to obtain assets from Retrophin
17 through the use of wires, and that is what the indictment
18 clearly alleges.

19 But I think what, if I'm hearing you right,
20 Mr. Brodsky, you're not so much challenging the allegations in
21 the indictment or the way the indictment is framed, but rather
22 whether or not the backdating shares were a separate
23 conspiracy or one conspiracy.

24 MR. BRODSKY: Yes, for this particular --

25 THE COURT: And the Government's indictment sort of

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1 states that the Count Seven conspiracy for wire fraud was
2 employed these three different schemes or means to achieve the
3 object of the conspiracy which was to defraud Retrophin.

4 MR. BRODSKY: I understand, your Honor. I don't
5 believe it satisfied *Guybell*. I don't think they've
6 demonstrated a collective venture toward a common goal. I
7 think their indictment says it's for one purpose and the
8 evidence is opposite of what their new theory is and I think
9 that --

10 THE COURT: I would just like to quote, since you're
11 talking about *Guybell*, and the exact same page you just
12 quoted, 359 F.3d at 689 states, "A single conspiracy is not
13 transformed into multiple conspiracies merely by virtue of the
14 fact that it may involve two or more phases or spheres of
15 operation so long as there is sufficient proof of mutual
16 depends and assistance."

17 MR. BRODSKY: I a hundred percent agree with that,
18 your Honor, embrace it, and say to your Honor that that is
19 further proof for us that there wasn't -- this MSMB backdating
20 theory could never plausibly by fact or by law ever be part of
21 a sphere of a collective venture to defraud Retrophin, Inc., a
22 public company that starts as a public company in December 12,
23 2012. I think it's a factual and legal impossibility, I'm
24 sorry, your Honor, you have our argument on that.

25 THE COURT: Was there anything else you wanted to

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1 argue about, Mr. Brodsky?

2 MR. BRODSKY: On the multiple conspiracies, your
3 Honor, I think that you've been -- you've heard our main
4 arguments.

5 THE COURT: All right. Do you want to talk about
6 lock-ups or wash trades?

7 MR. BRODSKY: Sure, your Honor, I'm happy to discuss
8 it.

9 I haven't read where, if you can direct me where in
10 your --

11 THE COURT: We didn't put it in.

12 MR. BRODSKY: Well, that makes it easier.

13 THE COURT: So that's why I want to hear why you
14 think it should be in.

15 MR. BRODSKY: Well, your Honor, I believe that the
16 record is, and I don't have a pinpoint cite for you from
17 Mr. Pierotti's testimony, but I believe the record, there is
18 evidence in the record that there is a theory that what the
19 individuals who were the -- in December 2012 in Mr. Shkreli's
20 office with Mr. Shkreli sitting in the chair and other people
21 sitting on the floor like Mr. Pierotti were discussing was
22 increasing the volume of Retrophin, Inc., securities.

23 We put into evidence through Professor Lewis that
24 there was zero evidence of a wash trade. Professor Lewis did
25 define it, but it is a legal term. It's a term that the

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1 instruction on it should come from your Honor. And it
2 shouldn't replace, it should be the governing term for what
3 wash trade is. And I think it's very helpful for the jury to
4 know what the wash trade is because I think your Honor puts
5 the term in there which is we put a Second Circuit definition
6 from *Reddy v. CFTC*, 191 F.3d 109-115. Second Circuit 1999.
7 It will define what a wash trade is for purposes of the jury.

8 As your Honor knows Mr. Rosensaft testified a little
9 bit about some of the testimony relating to trading today. We
10 put in evidence about why there is no wash trading, and we
11 think it would be helpful for the jury to the extent that the
12 jury is evaluating the evidence and Mr. Pierotti's testimony
13 and the documents and the trading. We think it would be
14 helpful to the jury to know what a wash trade is from the
15 Second Circuit.

16 (Continued on the next page.)
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1 MR. KESSLER: That's proof that it's not an
2 appropriate jury instruction. They called an expert to
3 testify about wash trade. They explained what they were it
4 is in the record. This is not a jury question.

5 MR. BRODSKY: Well --

6 THE COURT: The Government is not charging or
7 alleging that wash trades happen; is that correct?

8 MR. KESSLER: No.

9 THE COURT: So that the parties conspire from wash
10 trade.

11 MR. PITLUCK: There's only one place the wash
12 trade is in effect in this case and that's through Professor
13 Lewis who defined them, described what they were. That's
14 what the jury should rely on, not an instruction from the
15 Court about wash trades.

16 THE COURT: Yeah, it seems to me that the jury may
17 cure that and say why are we dealing with wash trades? How
18 is that part of this case? There were two witnesses offered
19 by the defense who testified about wash trades to the extent
20 Mr. Pierotti mentioned it happened in terms of the idea that
21 there's early December about wash trades, among other
22 things. Really more about who is going to get the shares,
23 where are they going to get them, what they're going to pay
24 for them what -- how they are to deal with their shares?

25 MR. BRODSKY: Your Honor, I think what we could do

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1 is look at Mr. Pierotti's testimony.

2 THE COURT: Okay.

3 MR. BRODSKY: And identify for you what we believe
4 is the testimony in the record.

5 THE COURT: But isn't it --

6 MR. BRODSKY: But that he was suggesting that
7 there was an effort to trade among the people for purposes
8 of increasing volume. I don't think the alleged conspiracy
9 in Count 8 is for people to get Fearnow shares. I think
10 that the alleged conspiracy --

11 THE COURT: Controlled --

12 MR. BRODSKY: -- wants to receive it, it is what
13 are you doing with them? And my understanding from
14 Mr. Pierotti's testimony and we'll go back again to the
15 record -- it is the record that controls is that he said "on
16 transcript Page 5944, Page 21 through 24 and this is, I
17 believe, the Government's direct examination, Question: To
18 Mr. Pierotti by the Government, What were the things he
19 said, referring to Mr. Shkreli, that made you nervous.

20 Answer: The two things he said that made me
21 nervous was that, you know, people who have experienced
22 trading could trade the shares back and create more volume.
23 And then he said Line 25 going over to 5945, then he said,
24 You know, at some point if we go tight, you know, you guys
25 could buy back in. But it is your money, they are agreed

1 shares, you do whatever you want with them.

2 So that line, Your Honor, is evidence in the
3 record Lines 22 to 24 transcript page 5944. And when
4 Mr. Shkreli said that these people are experienced can trade
5 the shares back and create more volume, the most reasonable
6 inference, of course, from that is that you're talking about
7 wash trading. And I believe his testimony during
8 Mr. Shkreli's trial was more particularized and if I had --
9 my recollection is correct, it is not always correct, is
10 that he was even more particularized about how people would
11 trade their shares back and forth with each other in the
12 same number to increase the volume that's classic wash
13 trading.

14 THE COURT: Well, you put a label on it that was
15 not before the jury. Isn't what Mr. Pierotti said, it is
16 not before the jury, you know, in terms of what Mr. Greebel
17 is charged with.

18 You introduced an expert who defined the term and
19 I think on direct you elicited from Mr. Rosensaft whether he
20 had been asked questions about wash trading.

21 But that testimony that you offered from
22 Mr. Pierotti, you know, you are -- I think what you are
23 saying is he never used the term to describe something that
24 your expert is defining wash trading, but he is not being
25 charged for that. It is like -- I am trying to think of the

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1 analogy.

2 MR. BRODSKY: Your Honor --

3 THE COURT: If a witness testified about something
4 that was unlawful that is not being charged, so many times
5 in drug cases there may be other things like money
6 laundering going on, but if the charge is about money
7 laundering then the instructions are going to be on that
8 not -- I'm sorry, if the indictment charges drug trafficking
9 and there is evidence in the record about money laundering,
10 it does not necessarily warrant an instruction about -- that
11 requires the Court to define money laundering.

12 In fact, I think a better instruction may be that
13 Mr. Shkreli -- Mr. Greebel is not being charged with wash
14 trading.

15 MR. BRODSKY: Your Honor.

16 THE COURT: Unless you want to say that.

17 MR. BRODSKY: Well, respectfully, within Count 8
18 it is a conspiracy to commit securities fraud Retrophin
19 unrestricted securities scheme. Paragraph 58 specifically
20 alleges what the statutory elements of that scheme are which
21 is to employ manipulative and deceptive devices and
22 contrivances. The Government has alleged that the purpose
23 was in part to create volume. You create volume through
24 wash trading. Their sole witness, their sole and singular
25 witness on Count 8 who testified about the alleged plan

1 hatched in the room that he does enjoin is the who one
2 testifies about what the plan was, which is to trade shares
3 with each other.

4 For the Government to suggest that that is not the
5 theory is, I think, Your Honor, a concession that should be
6 dismissed. But if they're not -- I don't understand why the
7 Government is refusing to allow Your Honor or objecting to
8 Your Honor instructing the jury when their own witness said
9 what the type of trading was supposed to be done, we put on
10 an expert who defined what we believe to be wash trading but
11 as Your Honor knows your instructions govern the law, not
12 any expert's opinion.

13 And you will instruct the jury about experts and
14 what their opinions and the weight that can be held upon
15 them. But your instruction on the law about the wash
16 trading is what controls and that is not some instruction
17 that the Government disputes. It is undisputable what the
18 definition of what a wash trade is. And if the Government
19 wanted to stand up and concede that there is no evidence of
20 wash trading, then of course Mr. Pierotti's testimony about
21 what the plan was, that should be evident to the jury. In
22 other words, Your Honor, what I'm trying to say is if we do
23 not get an instruction on wash trades, which is the evidence
24 elicited by their sole witness about what the plan was, we
25 will be severely prejudiced from arguing to the jury that

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1 this is the alleged plan that they hatched and this is how
2 you define how wash trading occurs.

3 And here's the evidence in the record that wash
4 trading did not place, place at all, not a singular one.

5 THE COURT: It is a conspiracy.

6 MR. BRODSKY: But, Your Honor, undoubtedly.

7 THE COURT: It is not going to stay.

8 MR. BRODSKY: It does not have to be place.

9 THE COURT: Security fraud is washed trades.

10 MR. BRODSKY: Your Honor, it does not have to be
11 that way, but from Mr. Pierotti's testimony that is what he
12 said the plan was.

13 MR. KESSLER: Your Honor, a charge conference --
14 Mr. Brodsky is characterizing a single piece of evidence in
15 the entire record saying that the only evidence is what
16 happened. Then he is saying his jury instruction on it
17 because it is our only theory in the case. There is no
18 basis for the jury instruction. The only question to that
19 is should there be a jury instruction on the definition of
20 wash trade? There should not. There is no case law that
21 says there should be a definition of wash trading. There is
22 an expert who defined it, it is in the record. Whether or
23 not wash trading occurred is in the record. Whatever all
24 the witnesses said is in the record. All the other evidence
25 is in the record. We are all going to argue it.

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1 MR. BRODSKY: Your Honor, they asked for a
2 definition of affiliate and you gave it to them and we
3 respectfully disagree with the definition and we'll talk
4 about that.

5 THE COURT: All right. Let's talk about that.

6 MR. BRODSKY: But I want to talk about first the
7 wash trades one. Because the denial of wash trading
8 definition, which the Government does not dispute the actual
9 definition and they could have objected when we put in the
10 evidence of wash trading. They did not stand up and object,
11 they did not move to preclude the wash trading evidence. If
12 Your Honor -- and respectfully, Your Honor, if you do not
13 give a jury instruction of what the definition of what is of
14 wash trading, we are prejudiced. Your Honor can deny it and
15 that is fine. But the Government does not dispute our
16 definition. It is an indisputable definition from the
17 Second Circuit case law. We believe it directly comes from
18 if sole singular witness of the Government who is at this
19 meeting about when the conspiracy is hatched and that is
20 Page 5944, Lines 22 and 24. And Your Honor can -- I
21 understand, Your Honor, you haven't put it in your written
22 instructions. It is incredibly prejudicial for us not to
23 have a court defined definition because the definition is
24 something that should come from the Judge as an instruction.
25 And the fact that the Government does not include it means

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1 that we are prejudiced.

2 They will include the definitions that they think
3 they can support.

4 THE COURT: You asked for a definition, so please
5 do not mistake a representation --

6 MR. BRODSKY: As they did, Your Honor.

7 THE COURT: Yes, both sides did it and I get it.
8 Do not tell me what I did because the Government asked me
9 and you did not. I'm tired of the mischaracterization,
10 Mr. Brodsky.

11 MR. BRODSKY: What I mean, Your Honor --

12 THE COURT: You asked for a definition and so did
13 the Government.

14 MR. BRODSKY: Your Honor, what I mean by when I
15 said the Government --

16 THE COURT: An affiliate information is all over
17 the record. There are SEC filings and there is testimony
18 about statements being signed about affiliates and so, you
19 know, I just -- I am just concerned. You continue to --

20 MR. BRODSKY: I'm sorry, Your Honor.

21 THE COURT: -- say that.

22 MR. BRODSKY: What I meant by --

23 THE COURT: It is not the first time.

24 MR. BRODSKY: What I meant by it, Your Honor, was
25 that I believe you adopted the terminology of the Government

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1 and not our terminology and I think our terminology is
2 correct on the law and the Government's terminology is wrong
3 on the law and that is what I meant by the affiliates.
4 The Government introduced this evidence in their direct case
5 about the purpose of what the conspiracy was. And my view
6 is that by denying us and I will stop, Your Honor, but by
7 denying us a court defined definition of a wash trade we are
8 prejudiced from proving to the jury that what Mr. Pierotti
9 said occurred actually did not occur.

10 And I know it is a conspiracy but when there is
11 actual evidence that what the co-conspirators allegedly said
12 they were going to do, does not happen, it is significant
13 compelling evidence that the conspiracy was never hatched.
14 I am not saying it is required but it is certainly
15 compelling evidence that such a conspiracy never existed.

16 I said my peace, Your Honor.

17 THE COURT: I am sorry you disagree with the
18 definition that was used for affiliate. It was taken from
19 the SEC CFR 17, Section 230.124.

20 MR. BRODSKY: We believe it is incomplete,
21 Your Honor. We believe that if you go to the SEC website
22 and if you go to actually what the SEC has fully and
23 completely said, they include director, officer and
24 10 percent shareholder. And the reason why that is so
25 important, Your Honor, is because those are the very words

1 that are used in the legal opinion letter of Jaclin --
2 Anslow & Jaclin. Those are the very words that are used in
3 the certifications that Mr. Greebel sought and the
4 affirmative statements that Mr. Greebel sought from the
5 Fearnow recipients pursuant to that legal opinion.

6 The fact that the Government has excluded them is
7 troubling to us and that is actually how practitioners look
8 at it.

9 So we've given a definition of affiliate since
10 we're on that, Your Honor. We are providing a definition of
11 affiliate to the jury, which I believe is chronological in
12 its terminology. I believe it creates confusion. I read it
13 over multiple times this afternoon as we got these requested
14 charge and I still do not understand what it means and it is
15 talking about -- it is control and it is controlling. And I
16 think that it is defined in practice and on the SEC website
17 and through the case law we cite as an officer, a director
18 or a 10 percent shareholder. Large shareholder.

19 THE COURT: Well, the publication, not the
20 regulation, the publication gives as examples for an
21 affiliate, the executive officer, director or large
22 shareholder in relation of control to the issuer and then it
23 defines control. You are citing from a publication, not the
24 regulation. I do not think publications have, you know, the
25 rule -- I wouldn't cite that as a legal instruction. It is

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1 an -- it is given as an example. It is not what the
2 regulation itself provides.

3 You cite it in your footnote but it is really
4 not -- it is really not in the Code of Federal Regulations,
5 unless you can show me where it is. If I have missed it,
6 correct me but...

7 MR. BRODSKY: We cited in substantial part from
8 the American standard no action letter, Your Honor, issued
9 by the SEC. It is the key definition that is used by every
10 securities practitioner in the country.

11 THE COURT: Well, I do not know that.

12 MR. BRODSKY: Well, Your Honor, we're happy to
13 provide an expert opinion on it.

14 THE COURT: I am looking at the regulation.

15 MR. BRODSKY: Your Honor, the regulation, and
16 people look to the regulation and then look to the SEC
17 American standard no action letter. And the practitioners
18 use it. And so the reason why it is important is -- and it
19 is what is actually used in this case. And the definition
20 that is provided, which is on Your Honor's jury instruction
21 Draft 1 December 8, 2017, talks about control affiliate is
22 someone directly or indirectly through one or more
23 intermediaries controls or is controlled by or under common
24 control with the issuer. And control is defined by the
25 power and direct management policies of the company if

1 question.

2 This definition, Your Honor, respectfully as
3 defined I believe is -- is un -- nobody could understand
4 that. I am -- with all respect, Your Honor, I do not think
5 a jury of laymen -- because I can't understand it. And I do
6 not believe it will be understandable to anybody. And I
7 think what the American standard no action letter did was
8 say this is what we mean when we say affiliate. It is a
9 director, it is an officer or it is a 10 percent shareholder.
10 The Government's omission of it is severely prejudicial to
11 us. We ask Your Honor to include it in the definition.

12 I know it was not included in Mr. Shkreli's trial
13 but Mr. Shkreli's counsel did not object to it.

14 THE COURT: 17CFR Section 230.405 defines terms
15 including, but not limited to, affiliates and control.

16 (Interruption in proceedings.)

17 THE COURT: What I tried to do is quote from the
18 regulation, the Code of Federal Regulations. The
19 regulations promulgated by the agency in determining the
20 terms at issue in this case. You want me to go to some
21 other source that is not a regulation and I am not going to
22 represent to the jury that this is a statement of the law,
23 regardless of whether or not you think most practitioners in
24 the United States rely upon it.

25 The Code of Federal Regulations sets forth the

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1 definition for affiliate and control and that is what I have
2 used.

3 MR. BRODSKY: Your Honor.

4 THE COURT: You cannot say to me that that is
5 inappropriate.

6 MR. BRODSKY: Your Honor.

7 THE COURT: Or you believe it, that is fine.

8 MR. BRODSKY: Your Honor, I am going to your
9 citation from the SEC website. I am going directly to it.
10 And I am doing it right now, and it says Rule 144 seller
11 restricted and controlled securities dated January 16th,
12 2013. It is defined as exactly as we say on Paragraph 2,
13 the control securities are those held by an affiliate of the
14 issuing company. And then it says, as we request, an
15 affiliate is a person, such as an executive officer, a
16 director or large shareholder in a relationship of control
17 with issuer.

18 That language, Your Honor, directly from the SEC
19 which comes from the American standard no action letter is
20 the critical language that fact issuers go to the SEC
21 website and if an executive officer, director or large
22 shareholder. That is how it is defined and it is from the
23 SEC. And I -- you know, all I can do, Your Honor, is
24 Your Honor to put that language in. We are not saying it
25 comes from some other language.

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1 MR. KESSLER: Your Honor, we are trying to look at
2 that but it sounded to me like what the court read, was a
3 person such as an officer, a director, a large shareholder.

4 THE COURT: Yes. It as an example from a
5 publication by the SEC. It is not quoted what the defense
6 is proffering is from the SEC publication but it is not
7 quoting the regulation, which is what the law -- the law is
8 the regulation, not --

9 MR. BRODSKY: The law -- the law is what the
10 SEC --

11 THE COURT: Not necessarily the SEC publication.

12 MR. BRODSKY: But that is not true, Your Honor.
13 The SEC is the one that has the authority given to it under
14 Section 1933 and 1934 Acts that allows the SEC with the
15 authority to promulgate the regulations and explain what the
16 terms are. And this is the leading authority that every
17 securities corporate lawyer looks to. And I am sorry,
18 Your Honor --

19 THE COURT: You asked for an definition --

20 MR. BRODSKY: Yes, Your Honor.

21 THE COURT: -- not an example. What you want is
22 an example, not a definition. The definitions are as set
23 forth.

24 MR. BRODSKY: Your Honor --

25 THE COURT: I put the definition that you

1 requested, the definition of an affiliate as set forth in
2 this CFR. The examples that are given in the publication
3 are examples. They are not definitions. You wanted a
4 definition as did the Government. I gave the definition.

5 MR. BRODSKY: Your Honor, we are asking for the
6 language coming from the SEC website, which is the language
7 that the SEC regulators tell the practitioners. Our client
8 is a corporate lawyer. He looks to, as did Anslow & Jaclin,
9 what the SEC has defined. Those examples are the examples
10 that are given by the SEC to everybody; an executive
11 officer, a director or a 10 percent shareholder, large
12 shareholder. That is the keystone. That is what people
13 use. And so without that, the definition is misleading and
14 the problem is, Your Honor, a what the jury will draw the
15 adverse inference from Mr. Greebel that what he did was he
16 defined it himself. He came up with a definition that it
17 had to be a director, an officer or a 10 percent shareholder
18 and he came up with that out of thin air. But if you look
19 through the SEC regulations that is what they define it as.

20 And so why is it important to us? Because in
21 defending a corporate lawyer from charges, we have to be
22 able to instruct the jury as to what the law is as corporate
23 lawyers receive it, study it and use it. And if the
24 Government cherry picks the definition, which they have and
25 advocates against putting this in, which they are, they are

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1 misleading the jury and we ask Your Honor not to adopt their
2 approach. It is misleading the jury because this case is
3 about the state of mind of our client and if we do not have
4 a jury instruction fleshing out that the affiliate
5 definition -- you can put in the entire definition, Your
6 Honor, from the SEC website, but it is important to us --
7 the Government can argue that it is just an example, but to
8 us those examples are reflected exactly as to what the
9 evidence is.

10 THE COURT: The Government has not made that
11 argument. The SEC said these are examples. Okay?

12 MR. BRODSKY: But it is important that it comes
13 from the SEC.

14 THE COURT: And -- could I finish.

15 MR. BRODSKY: Yes, Your Honor. I am sorry.

16 THE COURT: And your footnote at 83 of your
17 proposed instructions cite as a first authority for your
18 definition of affiliate the very regulation that I quote in
19 the instructions 17CFR 230.144.

20 MR. BRODSKY: And, Your Honor, we also cite
21 American standard and we cite the same -- I believe we would
22 probably cite the same website that we cite. In
23 Your Honor's citation we have no objection to it. We have
24 no objection to the citation 17CFR 230.405. We have no
25 objection to a second cite, which is to the SEC rule.

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1 And where you go to the SEC rule under 70 and you
2 just said that you include the full scope of the definition.
3 Because a partial definition is incredibly prejudicial to us
4 and it omits a significant portion and the one that we
5 believe is the most important part.

6 THE COURT: All right. Well, why don't we just
7 move on.

8 MR. BRODSKY: Yes, ma'am.

9 THE COURT: Okay. I will consider what you said.

10 MR. BRODSKY: Thank you, Your Honor.

11 THE COURT: I think what I instruct on the law I
12 want to give them the statute or the regulation or a
13 definition as prescribed by, you know, a Court that has --
14 to which I, you know, must give deference in terms of legal
15 definitions.

16 So I am -- what I am doing is giving the
17 regulatory definition. You are asking for examples in a
18 letter or a bulletin by the SEC. I am tired of defense
19 argument about suggesting that when I give a definition that
20 is within the Code of Federal Regulations and, in fact,
21 quoting verbatim, that that somehow is unfair to the
22 defense. I appreciate your argument. You've made it. I
23 have heard you.

24 MR. BRODSKY: Your Honor, in one last hope and I
25 just ask you do this: I withdraw the analogy to the

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1 following: You could give the statutory definition of wire
2 fraud and you could just give it without defining knowingly,
3 wilfully, without defining device, scheme, without defining
4 materiality, without defining any of those definitions, and
5 it would be incomplete and the jury would be confused and no
6 jury would know what to do. And what do Courts do, as
7 Your Honor has done in your jury instructions, you look to
8 case law, you look to the other -- to the development of
9 *Sand* and the instructions that define and give life to the
10 statutory terms. Without giving the SEC, which is the
11 authority on regulations, how they view it, we have -- we
12 will give the statutory terms from the regulation of CFR
13 which are not -- they do not give it light, that do not give
14 it any kind of sense for the jury with what do with it. And
15 therefore that is why I say it is prejudicial, Your Honor.
16 I believe you have the complete authority to add to it based
17 on SEC -- I am not asking you to look to some, you know,
18 obtuse site, I am asking you to look to the very citation
19 Your Honor has offered in the -- in your citations, which I
20 think is the right place to go, and flesh it out. That is
21 our last approach on this issue. Thank you for hearing us
22 out.

23 THE COURT: All right. I will say again for the
24 record that I think that an example that is given by a
25 regulatory agency like the SEC, where they use the terms

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1 such as, those are examples, are not necessarily the
2 definition that one would look to in a regulation. And, you
3 know, look, maybe the Government does not oppose this and
4 maybe we have just been arguing for a long time wasting a
5 lot of time about nothing.

6 MR. PITLUCK: Judge, at the risk of reopening
7 this, we think the definition we proposed, the Court has
8 valiantly decided it was appropriate, it was given at the
9 Shkreli trial. I think it is accurate, it is in the
10 regulation. I do not want to -- we do not want to -- we
11 think it is appropriate and we would ask the Court to keep
12 it.

13 THE COURT: Well, what's next? Do you want to
14 talk about lockup?

15 MR. BRODSKY: Sure, Your Honor. Is that -- again,
16 prior to coming here I did not have time to read your
17 proposed instructions, Your Honor. Is that in your --

18 THE COURT: No.

19 MR. BRODSKY: -- proposed instructions?

20 THE COURT: No.

21 MR. BRODSKY: Let me find our proposal.

22 THE COURT: I think there were some came in today
23 where the word "lockup" was used, if I am not mistaken. At
24 the time when we initially went through the instructions we
25 thought there really was not any basis and I did exclude

1 Mr. Ferruolo from testifying about it because to me it was
2 not relevant at all to anything here. I am just trying to
3 remember what I heard or saw.

4 MS. SMITH: Well, Your Honor, the Defense Exhibit
5 that was entered today where Mr. Shkreli was signing his SEC
6 questionnaire for the uplifting from NASDAQ in January of
7 2014. That, one of the attachments mention a lockup
8 agreement. I do believe there was a lockup period at some
9 point in 2014 which Mr. Shkreli violated. But it is
10 completely unrelated to the conduct charged in Count 8 which
11 has to do with the control of the Fearnow shares at the time
12 of the reverse merger in December of 2012. So that is the
13 context in which the word came up today.

14 If you remember at the last trial there was
15 testimony about how Mr. Shkreli had violated the lockup
16 provision. I -- and I can't remember if it was in
17 connection with Manchester and there was some testimony
18 about who knew about it when and when the Board found out,
19 that was part of the reason why Mr. Shkreli was removed as
20 CEO or one of the things in the mix. I am not sure that
21 that specific testimony came out at this trial because we
22 kind of limited some of Mr. Shkreli's bad conduct testimony
23 in the trial, but it is completely unrelated to the conduct
24 that is actually charged in Count 8.

25 (Continued on next page.)

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04:25 1 (Open court; no jury present.)

04:26 2 MS. SMITH: I'm not sure that that specific
04:26 3 testimony came out at this trial because we kind of limited
04:26 4 some of Mr. Shkreli's bad conduct testimony in this trial,
04:27 5 but, again, it is completely unrelated to the conduct that's
04:27 6 actually charged in Count 8.

04:27 7 MR. BRODSKY: Your Honor, at the risk of being
04:27 8 locked up myself with the court marshals, may I just return to
04:27 9 the definition of affiliate and ask Your Honor to add the
04:27 10 following request. In pretrial motions, the government
04:27 11 conceded and agreed that the mere fact that an individual was
04:27 12 an employee of Retrophin, Inc., did not make that person an
04:27 13 affiliate. So we would ask, Your Honor, in addition to our
04:27 14 request that you consider adding in the example from the SEC
04:27 15 regulatory authority that we discussed, that you add language
04:27 16 to the effect that the mere fact that an individual is an
04:27 17 employee of a public company does not make them an affiliate
04:27 18 of that public company.

04:27 19 THE COURT: Any objection?

04:27 20 MS. SMITH: Your Honor, can we just think about it,
04:27 21 since this is a brand new suggestion? I'm not saying we
04:28 22 necessarily oppose, but we will think about it and be ready to
04:28 23 let you know by the next time we do the charge conference.
04:28 24 And if we consent, we will let you know before the charge
04:28 25 conference.

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04:28 1 THE COURT: All right. So what you should do is
04:28 2 agree on exactly what language, if there's -- hopefully
04:28 3 there's going to be an agreement.

04:28 4 MR. KESSLER: We will try to work that out.

04:28 5 MR. BRODSKY: And just the cite -- is this the
04:28 6 transcript page from the pretrial hearing? We cite the
04:28 7 pretrial hearing where the government recognized it and agreed
04:28 8 with it, which is at page 191 of the transcript, lines 11 to
04:28 9 20. I am memorializing the government's agreement, the
04:28 10 government did not disagree that they have agreed.

04:28 11 So back to lock-ups, Your Honor, before I get locked
04:28 12 up.

04:28 13 THE COURT: Don't say that.

04:28 14 MR. BRODSKY: I'm sorry, Your Honor.

04:28 15 THE COURT: I haven't threatened you with anything
04:28 16 like that.

04:28 17 MR. BRODSKY: No, no, no. I'm joking, Your Honor.

04:28 18 THE COURT: No. We are not joking. I am not in the
04:28 19 mood to joke.

04:28 20 MR. BRODSKY: Sorry. Sorry. I know that,
04:29 21 Your Honor, you're the last person who would do that. So I
04:29 22 withdraw that.

04:29 23 THE COURT: Let's just get this done, please.

04:29 24 MR. BRODSKY: What's important to us on lock-ups,
04:29 25 Your Honor, is the following. There is the perception here,

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04:29 1 the allegation here, that there is something wrong, that it is
04:29 2 unlawful for a CEO of a public company to try to restrict
04:29 3 trading at all in the securities of a new public company. And
04:29 4 what the case law and what the SEC bulletins and the SEC
04:29 5 regulation show is that when -- at a time that some company
04:29 6 becomes a new public company, it is the most vulnerable time
04:29 7 for that public company, and there are lots of permissible
04:29 8 things that companies can do in order to restrict trading, in
04:29 9 order to protect the company, in the best interests of the
04:29 10 company and the shareholders. One of those things is
04:29 11 lock-ups. It doesn't have to be necessarily these words,
04:30 12 Your Honor, that we propose in proposed instruction 44 of
04:30 13 Docket No. 461-2.

04:30 14 THE COURT: Were there lock-up agreements actually
04:30 15 in the record?

04:30 16 MR. BRODSKY: There are no lock-up agreements as --
04:30 17 written lock-up agreements. And there are no lock-up
04:30 18 agreements, as I understand the term, which is, okay, you --
04:30 19 an underwriter enters in a lock-up agreement where the shares
04:30 20 cannot enter the public market too soon after some offering,
04:30 21 whether it is a reverse merger or an IPO.

04:30 22 THE COURT: But weren't the Fearnow shares given as
04:30 23 incentives?

04:30 24 MR. BRODSKY: Yes.

04:30 25 THE COURT: And with the idea that those shares had

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04:30 1 vesting provisions?

04:30 2 MR. BRODSKY: There was no vesting because they
04:30 3 were --

04:30 4 THE COURT: No?

04:30 5 MR. BRODSKY: They were the result of a convertible
04:30 6 note that at the time that the company, you know, DGTE
04:30 7 became -- merged into -- the shell company merged in
04:31 8 Retrophin, they became freely trading. And there was no
04:31 9 vesting at that time, as I understand it. The government can
04:31 10 correct me if there -- if I am wrong on their theory.

04:31 11 MR. PITLUCK: Judge, can we just --

04:31 12 THE COURT: So why would we give -- I just want to
04:31 13 know why we would give an instruction on lock-ups if there's
04:31 14 no evidence in the record about --

04:31 15 MR. BRODSKY: That's why I'm saying, you don't have
04:31 16 to use the word "lock-ups," Your Honor. What's important to
04:31 17 us is the concept and our view that it is important for the
04:31 18 Court to express that there's nothing -- there is -- there are
04:31 19 practices that are perfectly permissible that allow companies
04:31 20 to attempt to restrict trading in their shares following a new
04:31 21 issuance, following the birth of a public company. And
04:31 22 Your Honor can put the language that says, you know, however,
04:31 23 you know, if parties -- if two or more people agree to
04:31 24 illegally control the shares, you know, in violation of the
04:32 25 law, if you want to put countervailing language. What's

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04:32 1 important to us is that the record reflect what the law is,
04:32 2 which is the concept that, blessed by the Securities and
04:32 3 Exchange Commission, companies have various methods in which
04:32 4 they can restrict trading in the securities to protect the
04:32 5 interests of the company and the shareholders.

04:32 6 THE COURT: Okay. Your proposed instruction on
04:32 7 lock-ups, I ask the government to look at it and see if there
04:32 8 are issues that they would agree to, including the proposed
04:32 9 language that Mr. Brodsky has just stated. There's also
04:32 10 brackets saying "to be supplemented at the end of any defense
04:32 11 case." What is that? What should we be expecting on that?

04:32 12 MR. BRODSKY: Well, we weren't sure we were putting
04:32 13 on a defense case when we wrote this, Your Honor.

04:32 14 THE COURT: Right, I know, but you had a defense
04:32 15 case in your mind that you would maybe supplement something
04:32 16 about lock-ups. What would you say?

04:33 17 MR. BRODSKY: Well, what we would say is that in --
04:33 18 following "the government alleges that Mr. Greebel and others
04:33 19 conspired to enable Shkreli to control the price and trading
04:33 20 of the Fearnow shares of stock," Mr. Greebel argues that there
04:33 21 was no such conspiracy to control the price and trading and --
04:33 22 and any limitations.

04:33 23 THE COURT: So if there was no agreement, why would
04:33 24 I tell the jury that it didn't happen, but there's nothing
04:33 25 wrong with it? Is that what you want me to do?

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04:33 1 MR. BRODSKY: Your Honor, why don't we provide you
04:33 2 with the language rather than do it now, sitting here.

04:33 3 THE COURT: I am going to either deal with this
04:33 4 lock-up language as proposed, which, again, was received by
04:33 5 the Court after many, many, many extensions and opportunities.
04:33 6 I am just trying to get this finished, and I don't really have
04:34 7 the ability to keep rehashing what could have and should have
04:34 8 been provided.

04:34 9 What I want to know from the government is whether
04:34 10 they have an issue with proposed lock-up language, whether
04:34 11 they believe that it shouldn't come in at all, whether there's
04:34 12 some compromise, you know.

04:34 13 MR. PITLUCK: Your Honor, can we be heard very
04:34 14 briefly?

04:34 15 THE COURT: Yes.

04:34 16 MR. PITLUCK: Your Honor, this is utterly irrelevant
04:34 17 language that serves no purpose other than to confuse the
04:34 18 jury. There are no -- there have been no agreement -- no
04:34 19 evidence related to lock-up agreements whatsoever. It is an
04:34 20 attempt to insert in the jury's mind that in totally unrelated
04:34 21 situations, in totally unrelated factual predicates, in
04:34 22 instances where a company may go through an SEC process to
04:34 23 lock up shares, that because in certain instances it is
04:34 24 permitted, it should be considered here.

04:34 25 It is confusing and it is prejudicial to the

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04:34 1 government, and to the law, because it is like saying,
04:34 2 somebody's on trial for murder, but in certain circumstance
04:35 3 and situations it is legal to kill somebody for self-defense,
04:35 4 when self-defense is not a defense in the case.

04:35 5 Now, I don't want to create another 15-minute
04:35 6 monologue, but there are no issues related to lock-ups.
04:35 7 There's no evidence that they were discussed, there's no
04:35 8 evidence that they were disclosed, there's no evidence that
04:35 9 they were proposed. The term literally hasn't come up. And
04:35 10 to inject into the jury's mind that in totally unrelated
04:35 11 situations of unrelated cases in IPOs, which weren't even
04:35 12 discussed here, a lock-up agreement may be permitted, confuses
04:35 13 the jury as to what the relevant factual legal issues are
04:35 14 here.

04:35 15 And we would note, whether these were granted as
04:35 16 incentive compensation as -- we strenuously oppose. We think
04:35 17 that these were given to Mr. Shkreli's friends for control,
04:35 18 and the evidence has shown that. But that's a matter for the
04:35 19 jury to decide. And injecting them with an unrelated
04:35 20 situation of when a lock-up agreement is appropriate serves no
04:35 21 purpose here. This instruction is confusing and misleading
04:36 22 and is not relevant to the issues.

04:36 23 THE COURT: Okay. I understand the government's
04:36 24 position.

04:36 25 MR. PITLUCK: Sorry, Judge.

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04:36 1 THE COURT: It's all right.

04:36 2 MR. PITLUCK: I apologize. I don't get to talk
04:36 3 much.

04:36 4 MR. BRODSKY: It was passionately given, Your Honor.

04:36 5 THE COURT: Let's talk about GAAP. Did you want --
04:36 6 you stated something on GAAP, and I know that the term has
04:36 7 been used. They defined it, the witnesses did define the GAAP
04:36 8 term as generally acceptable accounting principles or
04:36 9 something like that. But do we -- I don't know if we need an
04:36 10 instruction on GAAP.

04:36 11 MR. PITLUCK: Judge, can we just table it? We want
04:36 12 to review the GAAP instruction. We haven't -- there is no
04:36 13 GAAP instruction, as I understand, now, right?

04:36 14 THE COURT: No.

04:36 15 MR. PITLUCK: Okay. And as the Court has requested,
04:36 16 we'll look at it and see, because we haven't considered it,
04:36 17 Judge, so I don't want to -- the one that they submitted.
04:37 18 Sorry, Judge, if I am not clear. We will look at the one they
04:37 19 submitted and come back to it because I am sure the Court will
04:37 20 want our position before hearing debate on it.

04:37 21 THE COURT: Yes.

04:37 22 MR. BRODSKY: I am confident, Your Honor, that they
04:37 23 will be persuaded by our definition.

04:37 24 THE COURT: Okay.

04:37 25 MR. PITLUCK: I'm less confident, but we will

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04:37 1 certainly look at it.

04:37 2 THE COURT: Okay. Then we have alter ego. I
04:37 3 think -- I was getting a little wind of this, I guess, in
04:37 4 Ms. Klein's proposed disclosures where she talked about
04:37 5 piercing the corporate veil, which has absolutely no
04:37 6 relationship or relevance or application in this case.

04:37 7 I think the government now is -- well, not the
04:37 8 government. Sorry. The defense is proposing alter ego. I am
04:37 9 not going to give a veil piercing. How is veil piercing even
04:37 10 relevant?

04:37 11 MR. BRODSKY: Well, it is actually, Your Honor, not
04:37 12 only quite relevant, but a central issue in the settlements
04:38 13 theory. So one of the reasons why Retrophin, Inc., in 2013
04:38 14 was vulnerable to a lawsuit and was sued from time to time
04:38 15 because of MSMB actions is because of the alter ego theory.

04:38 16 THE COURT: No, they actually, respectfully, the
04:38 17 veil piercing says whether a corporate officer or principal or
04:38 18 founder can be found liable. Usually in the corporate form,
04:38 19 the idea is to shield the corporate officer from liability.
04:38 20 And let's not forget that here, you want to apply this theory
04:38 21 to protecting the corporation from the acts of the officer. I
04:38 22 think it works -- you know, the veil piercing usually is
04:38 23 applied to reach an individual who's generally not liable if
04:39 24 they are a corporate officer. It is rather the depiction of
04:39 25 the corporation that would be liable. I mean, unless I am

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04:39 1 just missing --

04:39 2 MR. BRODSKY: Your Honor, you may be right in some
04:39 3 of the cases that it is to reach individuals, which is a well
04:39 4 established -- we ask Your Honor to look at it, we cited cases
04:39 5 for it. There is a well-established concept of piercing the
04:39 6 corporate veil when that's common control between entities,
04:39 7 and under various factors, and it happens, you know, to
04:39 8 corporate America's chagrin, it happens a lot. And there are
04:39 9 well-established factors under Delaware law and lots of cases
04:39 10 on this.

04:39 11 So I won't, you know, I won't belabor the point, but
04:39 12 we're very confident if Your Honor looked at it, what a lawyer
04:39 13 would do looking at Retrophin, Inc., is I'll sue Retrophin,
04:39 14 Inc., and the way to do it, what MSMB did, is through this
04:39 15 alter ego theory, which would be actually quite effective in
04:40 16 the circumstances of MSMB and Retrophin. One of the factors,
04:40 17 for example, is whether or not you have a common shareholder
04:40 18 or owner that's in control. And Mr. Shkreli owned, you know,
04:40 19 such a substantial portion of Retrophin during the relevant
04:40 20 period, and he owned such a substantial proportion of MSMB
04:40 21 during the relevant period. Another factor is commingling.
04:40 22 And there's undisputed evidence in the record about
04:40 23 commingling between Retrophin's offices and MSMB's offices,
04:40 24 and they're using the same e-mails, and all that stuff.

04:40 25 THE COURT: Which are --

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04:40 1 MR. BRODSKY: I would cite to Your Honor *United*
04:40 2 *States v. Evseroff*. We put this in our papers. It is 2012 WL
04:40 3 1514860, pinpoint cite 13 to 14, an Eastern District of New
04:41 4 York case, April 30, 2012. It says, quote: The alter ego
04:41 5 doctrine allows a creditor to disregard the corporate form.
04:41 6 We cite a number of other cases, Your Honor, for the
04:41 7 proposition, including a Supreme Court case, and we cite the
04:41 8 Second Circuit case. So we do believe that these are
04:41 9 well-established concepts for piercing corporate veils between
04:41 10 entities.

04:41 11 MR. KESSLER: So, Your Honor, we can take a look at
04:41 12 instruction, but it is not relevant. This is another example
04:41 13 of -- I don't think alter ego or veil piercing has been
04:41 14 mentioned in this case by any witness, and I don't think it is
04:41 15 on any document. Further -- so we are injecting an issue that
04:41 16 is not in the case. Furthermore, they are apparently going to
04:41 17 call Ms. Klein to testify about who she would have sued or not
04:41 18 sued. So she will say whatever she's going to say, that's
04:41 19 from the plaintiff's side, and that will be the evidence.
04:41 20 But, again, this is an effort to bolster Ms. Klein through a
04:41 21 jury instruction about an issue that isn't relevant to the
04:42 22 case at all in the first place.

04:42 23 MR. BRODSKY: Your Honor, you've heard a lot about
04:42 24 commingling, extensive evidence of commingling through
04:42 25 multiple witnesses.

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04:42 1 THE COURT: But I've also heard a lot of questions
04:42 2 that Mr. Greebel was unaware of it.

04:42 3 MR. BRODSKY: Commingling, I'm sorry, Your Honor --

04:42 4 THE COURT: Except for the accounting, but that he
04:42 5 didn't have access to the bank accounts, and he didn't really
04:42 6 understand what -- he didn't discuss or have knowledge about,
04:42 7 or there's no evidence that he had knowledge of Mr. Shkreli's
04:42 8 use of funds from one entity to pay the obligations of the
04:42 9 other, except the charges here.

04:42 10 And so I -- I think that -- I want to stick to what
04:42 11 we talked about now, which is alter ego as veil piercing.

04:42 12 MR. BRODSKY: And commingling is included in that.

04:42 13 THE COURT: I know it is part of that, I know it is
04:42 14 part of that. But the bottom line is --

04:42 15 MR. BRODSKY: Judge, you're asking --

04:42 16 THE COURT: The bottom line is, what evidence is
04:42 17 there that any of that was even in Mr. Greebel's head. What
04:42 18 we do have evidence of is that the threats by many investors
04:43 19 and their counsel to Mr. Shkreli, and copying Mr. Greebel, or
04:43 20 having Mr. Shkreli copy Mr. Greebel on these threats, that he
04:43 21 perceived that these folks were going to come after Retrophin.
04:43 22 And so -- and even MSMB, to the extent there was any reason to
04:43 23 do it.

04:43 24 But there's no evidence at all about the commingling
04:43 25 being a factor in Mr. Greebel's head or that he thought about

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04:43 1 those issues. What's important, I think, and what is relevant
04:43 2 to the defense case is that Mr. Greebel knew there were
04:43 3 threats.

04:43 4 MR. BRODSKY: No, Your Honor, it is beyond that.
04:43 5 Respectfully, Your Honor, Mr. Greebel absolutely knew about
04:43 6 commingling from the very basics. He doesn't need to have
04:43 7 access to a bank account to know about commingling. Corey
04:44 8 Massella testified about all the intermingling between MSMB,
04:44 9 and there's extensive evidence --

04:44 10 THE COURT: I just said that. I just said that.

04:44 11 MR. BRODSKY: Yes, Your Honor.

04:44 12 THE COURT: I know that, Counsel.

04:44 13 MR. BRODSKY: Even testified about commingling and
04:44 14 his concern about commingling, and we elicited a lot of
04:44 15 evidence about it because it was incredibly relevant to us,
04:44 16 and we will establish to our defense case more of the
04:44 17 relevance in the mind of Mr. Greebel relating to commingling
04:44 18 and piercing the corporate veil and this alter ego concept.
04:44 19 And it is not just that there's a threat, Your Honor. It is
04:44 20 not just that I, Lindsay Rosenwald, venture capitalist,
04:44 21 extraordinarily successful with, you know, multi-million
04:44 22 dollar ability to file a lawsuit, and sending you a corporate
04:44 23 threat letter through Mr. Stanfield, a real lawyer. It is not
04:44 24 just that. It is not just the allegations of a conflict of
04:44 25 interest that are being alleged, but it is the actual

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04:45 1 knowledge that MSMB and Retrophin used the same offices. It
04:45 2 is the actual knowledge that they are in control by the same
04:45 3 person. It is the actual -- there's no denying that everybody
04:45 4 knew he controlled MSMB, and he also controlled Retrophin,
04:45 5 LLC. And during the 2012 period, during the relevant period,
04:45 6 these are facts that Mr. Massella, Mr. Aselage, numerous other
04:45 7 witnesses, Your Honor, Mr. Richardson, everybody drew
04:45 8 attention to this. In fact, Mr. Richardson testified that
04:45 9 there was an overlap period. And a long period of time in
04:45 10 2013, he understood that there had to be true-ups because of
04:45 11 the overlap between the two entities.

04:45 12 This is definitely part of Mr. Greebel's state of
04:45 13 mind in 2013. Despite Mr. Kessler shaking his head no, this
04:45 14 is part of his state of mind in 2013 when there were threats
04:45 15 being made at Retrophin, Inc.

04:45 16 Your Honor, if Retrophin, Inc., had nothing do with
04:45 17 MSMB, if one was located in Nebraska and one was -- and MSMB
04:46 18 was located in Nebraska, and Retrophin, Inc., was located in
04:46 19 New York, and they had separate management and separate
04:46 20 corporate structures, and everything was separate, when a
04:46 21 threat came in to Retrophin, Inc., there wouldn't be a concern
04:46 22 that there would be a lawsuit.

04:46 23 THE COURT: The key that you are missing is that
04:46 24 there isn't evidence about what was in Mr. Greebel's head
04:46 25 about what is clear. And what I think is your strongest bit

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04:46 1 of evidence on this is that Mr. Greebel was aware that people
04:46 2 were suing. It doesn't really matter whether it was under an
04:46 3 alter ego theory that some expert's going to come in and talk
04:46 4 about maybe -- or whether it is torts or conversion or unjust
04:46 5 enrichment. He knows there are threats. I don't think all
04:46 6 the other details or the possible theories or the little
04:46 7 pieces of evidence that you want to say were in Mr. Greebel's
04:47 8 mind when he settled cases or drafted settlement agreements or
04:47 9 consulting agreements as client's request are really the key.
04:47 10 What's key is he knew there were threats against his clients,
04:47 11 okay.

04:47 12 And so I think you are going to end up confusing the
04:47 13 jury, they are going to start to wonder what evidence there is
04:47 14 that Mr. Greebel was even aware of all these theories or
04:47 15 actually thought about them. I think the cleanest, most
04:47 16 basic, most compelling evidence I think in the record is that
04:47 17 these threats were made by lawyers and by investors. And they
04:47 18 didn't set out theories that we're going to sue you under a
04:47 19 theory of alter ego, we're going to sue your client under a
04:47 20 theory of veil piercing. They just said, we're going to sue
04:47 21 you. We are going to exercise our legal remedies and come
04:47 22 after you.

04:47 23 I don't know why you want to muddle up the record
04:47 24 and confuse the jury and all of that.

04:48 25 MR. BRODSKY: Your Honor, our client has heard you

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04:48 1 and we would like to think about it. We'd like to think about
04:48 2 your comments, and we will talk to him this weekend in light
04:48 3 of Your Honor's comments.

04:48 4 THE COURT: Okay. I mean, I don't -- I am not
04:48 5 trying to tell you how to do your case.

04:48 6 MR. BRODSKY: No, I understand, but I think --

04:48 7 THE COURT: But I'd just like --

04:48 8 MR. BRODSKY: -- we would like to talk to him about
04:48 9 it over the weekend.

04:48 10 MR. PITLUCK: Your Honor, I notice we're approaching
04:48 11 the hour that we need to leave.

04:48 12 THE COURT: Oh, yes.

04:48 13 MR. PITLUCK: I'd like to raise two quick nonjury
04:48 14 charge issues before we break for the weekend.

04:48 15 And the first is, we are looking forward to the
04:48 16 defense's remaining witnesses tonight, for next week, on the
04:48 17 representation that we would be done by Wednesday. And we are
04:48 18 looking for that.

04:48 19 The second is that this afternoon after we broke,
04:48 20 defense counsel issued another Rule 17 subpoena to Retrophin,
04:48 21 seeking 21 documents based on -- appears to be the same set of
04:48 22 documents that were not provided to us and consistent with --
04:48 23 I don't know what Retrophin's position is going to be,
04:49 24 obviously, but consistent with the Court's position last time,
04:49 25 we would request that the Court order the defense counsel to

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04:49 1 turn over the underlying documents for each of those 21
04:49 2 subpoenas, noting, of course, that we are now getting to the
04:49 3 conclusion of the defense case or what -- they obviously
04:49 4 should be precluded based on the timeliness and the -- for all
04:49 5 the other reasons, and I know we're late in time so I am going
04:49 6 to save the argument. But at the very least, until Retrophin
04:49 7 decides their position and until we have a chance to know what
04:49 8 these are, we would ask that they be provided to us, as
04:49 9 consistent with what the --

04:49 10 THE COURT: The underlying documents, the 21
04:49 11 documents that are listed in the subpoena.

04:49 12 MR. PITLUCK: Unless the Court just wants to
04:49 13 preclude the subpoena based on its timeliness at this point
04:49 14 anyway.

04:49 15 MR. BRODSKY: Your Honor, our team has told us that
04:49 16 there were 20 document requests in the subpoena, 15 of those
04:49 17 20 were given to the government last Saturday. So they may
04:49 18 want to amend that. There are only 5 of the 20 that we just
04:49 19 identified as documents that we want to use, and so they have
04:50 20 15 as of last Saturday when I believe Your Honor had
04:50 21 instructed us to give them documents, so we did give -- if
04:50 22 they weren't on the subpoena -- so let me back up.

04:50 23 Your Honor, we had two subpoenas, and I believe on
04:50 24 or about November 28 is in my head, Your Honor issued an order
04:50 25 saying give them any documents of those you intend to use. So

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04:50 1 we did. But then we added 15 more, which we had not issued a
04:50 2 subpoena for, but we knew we were going to. So we gave them
04:50 3 those additional 15. We hadn't issued the subpoena. So they
04:50 4 had an extra 15 last Saturday, which weren't included in the
04:50 5 November 28 subpoenas. And then we took those 15, we did
04:50 6 issue a subpoena with respect to those 15, and we added five
04:50 7 more documents.

04:50 8 And, I am sorry, 19, not 20. 15 already provided.
04:50 9 So there are four -- of the 20 -- of the 19, only four were
04:51 10 not given to the government last Saturday. Because we had not
04:51 11 identified them as ones we would use, and we intended to use
04:51 12 in our case in chief.

04:51 13 MS. SMITH: And, Your Honor, for the -- obviously,
04:51 14 defense didn't let us know that when they served the subpoena,
04:51 15 so to the extent that we received them by Your Honor's
04:51 16 deadline of last Saturday, those 15, if they are able to get
04:51 17 them from Retrophin and verify their authenticity, we won't
04:51 18 have any objection. For the four documents that were not
04:51 19 provided by Your Honor's deadline, they should be precluded.
04:51 20 They were clearly in the defense's possession, they chose not
04:51 21 to provide them, and this is, you know, a very, very late
04:51 22 hour, not only after the government's case, but after
04:51 23 witnesses have testified in the defense case.

04:51 24 MR. BRODSKY: Your Honor, our case is allowed to
04:51 25 evolve. We are allowed to hear the testimony of witnesses, we

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04:51 1 are allowed to examine documents, we are allowed to evolve our
04:51 2 defense case. Let me remind the government that during their
04:51 3 government case in chief, they added over 200 new government
04:51 4 exhibit during their case in chief. During their case in
04:52 5 chief. And that violated all sorts of, you know, last minute
04:52 6 requests.

04:52 7 So during the government's case in chief, they
04:52 8 marked new exhibits, and we did not stand here and stop the
04:52 9 government from doing it. Yet when we put on a defense case
04:52 10 in chief, the government then insists that, oh, there's a
04:52 11 deadline for you to put on evidence. Stop. And I have to
04:52 12 say, Your Honor, having put on evidence of innocence, that the
04:52 13 government never spoke to people prior to indictment or even
04:52 14 prior to July of 2017, we stand here incredulous that the
04:52 15 government is asking Your Honor to deny us four additional
04:52 16 documents.

04:52 17 MS. SMITH: Your Honor, this is a Rule 16 issue.
04:52 18 They were in their possession. The exhibits that we added to
04:52 19 our exhibit list during trial were either exhibits that they
04:52 20 had, or documents that they've had, we produced them in
04:52 21 Rule 16, or in a very limited set of circumstances, and
04:52 22 usually in response to a defense subpoena that was being
04:53 23 served on Retrophin. We did serve new subpoenas for documents
04:53 24 that were not in our possession previously.

04:53 25 This is a Rule 16 issue. They had them in their

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04:53 1 possession last week, unless Mr. Brodsky can say that they
04:53 2 didn't, that these are -- that somehow they provided these
04:53 3 very specific requests to Retrophin for documents they never
04:53 4 heard of before. They are not new documents, they're
04:53 5 documents that were in their possession. They chose not to
04:53 6 provide them to us last Saturday, and the deadline passed. It
04:53 7 was for the same reasons that we argued in our Rule 16 motion
04:53 8 last week.

04:53 9 MR. BRODSKY: Ms. Smith is correct, we did have
04:53 10 them, Your Honor, but we had not identified them as ones we
04:53 11 intended to use. And as we understand the Rule 16, it's ones
04:53 12 we intend to use. We did give them the additional 15, which I
04:53 13 think demonstrates the good faith. We were trying to give
04:53 14 them everything we intended to use in our case in chief. We
04:53 15 would just ask Your Honor to consider that.

04:53 16 THE COURT: I have considered it. I accept the
04:53 17 representation that these additional four documents were not
04:53 18 intended at the time. The other documents to be used, they
04:54 19 are going to be used then. Did you give them copies of those
04:54 20 additional four?

04:54 21 MR. BRODSKY: I am being told by Ms. Rubin there are
04:54 22 five, I apologize, there are five additional ones, we will
04:54 23 give them today. We will e-mail them immediately after the
04:54 24 proceeding ends.

04:54 25 THE COURT: Okay. And then I wouldn't preclude them

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04:54 1 on Rule 16 grounds just because I think these may have become
04:54 2 important to them as the case evolved and their intention is
04:54 3 to use them may have been of more recent vintage. But you
04:54 4 better them e-mail them tonight.

04:54 5 MR. BRODSKY: We will e-mail them tonight.

04:54 6 THE COURT: And if there's another issue that we
04:54 7 have to deal with regarding these documents, I will deal with
04:54 8 it.

04:54 9 MR. BRODSKY: And our likely order of witnesses,
04:54 10 Your Honor --

04:54 11 THE COURT: Yes. Who are they?

04:54 12 MR. BRODSKY: -- for next week.

04:54 13 THE COURT: I would like to know, too, because I
04:54 14 have to schedule -- I need to know when we are going to charge
04:54 15 the jury, and, you know, how we are going to inform the jury,
04:54 16 if we are, which I think we will have to, that they are not
04:54 17 going to be finished by the 15th of December.

04:54 18 MR. BRODSKY: So during the break, Your Honor, we
04:54 19 were focused on the requested charge. Between when court
04:55 20 ended around 2:00 or 2:15, we focused on the requested charge
04:55 21 with our client. He is taking the train back now. When he
04:55 22 gets out of the subway, we will speak to him from the train to
04:55 23 his home, so we can talk to him about the witnesses for next
04:55 24 week, and then we will e-mail them to Your Honor, and we will
04:55 25 e-mail them to the government. We just wanted to talk to our

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04:55 1 client about the likely order of the witnesses and who we're
04:55 2 going to call.

04:55 3 THE COURT: Well, without prejudice to your changing
04:55 4 the order, could you just tell us now who you are calling --

04:55 5 MR. BRODSKY: Certainly on Monday morning,
04:55 6 Your Honor --

04:55 7 THE COURT: -- on Monday and Tuesday.

04:55 8 MR. BRODSKY: -- I think it is highly likely, Your
04:55 9 Honor, on Monday morning, no question, we would call Howard
04:55 10 Cotton as our first witness. That's definitive. I think it
04:55 11 is likely, although we have to speak to him, that will be
04:55 12 Professor Johnson. We're not sure. We need to talk to him.
04:55 13 Dr. Rosenfeld would likely go Tuesday. I think we have some
04:56 14 scheduling issues with him. And --

04:56 15 MR. KESSLER: You said Professor Johnson. Did you
04:56 16 mean Mr. Johnson?

04:56 17 MR. BRODSKY: I'm sorry. Alan Johnson. I call all
04:56 18 my experts, our experts, professors, even though they're not.
04:56 19 Sorry, Your Honor. That's how I think of them.

04:56 20 But we will fill out the rest of the list. That is
04:56 21 as far as -- we have a debate among ourselves as to who we're
04:56 22 calling.

04:56 23 THE COURT: All right. We'll continue this. It
04:56 24 will have to be Tuesday evening at 5:00 or 5:30.

04:56 25 MR. BRODSKY: Your Honor, I just want to be clear.

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04:56 1 We are not going to submit a writing on the requested charge,
04:57 2 right? You do not want us to go through --

04:57 3 THE COURT: I think you have had enough opportunity.

04:57 4 MR. BRODSKY: No, no. With respect to the charges
04:57 5 you already have. If it is helpful, it is helpful. If it's
04:57 6 not, we won't do it. If it is helpful to you to go through
04:57 7 the requested charge, for example, that you provided, and
04:57 8 provide you with our annotations or our thoughts on it, we can
04:57 9 do it. But if that was unhelpful as an exercise, we won't do
04:57 10 it. We defer to Your Honor. I just wanted to offer it up as
04:57 11 a possibility, if you thought that was easier.

04:57 12 THE COURT: This is what I am interested in. If I
04:57 13 am committing legal error by stating something in some way
04:57 14 that the parties would like me to change, I am interested in
04:57 15 hearing about it, okay. But if I make a judgment call about
04:57 16 whether an instruction should be given, you know, I would like
04:57 17 to try to just have some understanding that based on our
04:57 18 review of the law and what we think is appropriate, given the
04:57 19 record, that that is the instruction we are going to give or
04:58 20 not give. I just don't want more instructions --

04:58 21 MR. BRODSKY: Understood.

04:58 22 THE COURT: -- and I am happy to be told if there's
04:58 23 some legal error. Saying that something's extremely unfair or
04:58 24 extremely prejudicial, without case law it doesn't really help
04:58 25 me.

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04:58 1 MR. BRODSKY: Okay.

04:58 2 THE COURT: I want to see the cases, if you have
04:58 3 cases, but you really should have given me the cases long ago
04:58 4 because the time and the opportunity, multiple opportunities,
04:58 5 has long since passed.

04:58 6 MR. PITLUCK: Your Honor, we intend to review the
04:58 7 case law and be prepared to address any issues at the charge
04:58 8 conference, consistent with Your Honor's ruling. We don't
04:58 9 intend to submit anything in writing.

04:58 10 THE COURT: All right. You can also discuss amongst
04:58 11 yourselves issues that are in dispute. I mean, the more you
04:58 12 can agree to, the better. Or maybe just by talking to each
04:58 13 other, if someone -- if one side really wants an instruction,
04:58 14 there could be some middle ground about how that language
04:58 15 could be utilized to make it appropriate. But I am concerned
04:59 16 in -- about confusing the jury, prolonging unnecessarily their
04:59 17 deliberations with issues that aren't really in the case,
04:59 18 et cetera.

04:59 19 MR. BRODSKY: Yes, Your Honor.

04:59 20 THE COURT: I just think we've had enough
04:59 21 submissions, for the most part. If I need more, I will put an
04:59 22 order in.

04:59 23 MR. BRODSKY: Understood.

04:59 24 MR. PITLUCK: Thank you.

04:59 25 MR. BRODSKY: Thank you, Your Honor, for doing it so

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04:59 1 quickly.

04:59 2 THE COURT: All right.

3 MS. SMITH: Have a good weekend.

4 THE COURT: Have a good weekend. Thank you.

5 (WHEREUPON, at 5:00 p.m., the proceedings were
6 adjourned until 9:00 a.m., Monday, December 11, 2017.)

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